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REPORTS OF THE SUPREME COURT

OF THE

UNITED STATES.

UNITED STATES REPORTS,

SUPREME COURT.

VOL. 102.

CASES

ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

OCTOBER TERM, 1880.

REPORTED BY

WILLIAM T. OTTO.

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MR. JUSTICE HUNT, *by reason of indisposition, took no part in deciding the cases reported in this volume.*

MR. JUSTICE CLIFFORD, *for the same reason, took no part in deciding the cases after Brooks* v. *Railroad Company, p.* 107. *That case and the preceding ones were decided at the last term.*

MR. JUSTICE STRONG *took no part in deciding the cases reported after Meriwether* v. *Garrett, p.* 472, *except Springer* v. *United States, p.* 586; *Wells* v. *Supervisors, p.* 625; *and Tilghman* v. *Proctor, p.* 707.

JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

HON. MORRISON R. WAITE.

ASSOCIATES.

HON. NATHAN CLIFFORD.	HON. NOAH H. SWAYNE.
HON. SAMUEL F. MILLER.	HON. STEPHEN J. FIELD.
HON. WILLIAM STRONG.[1]	HON. JOSEPH P. BRADLEY.
HON. WARD HUNT.	HON. JOHN M. HARLAN.

ATTORNEY-GENERAL.

HON. CHARLES DEVENS.

SOLICITOR-GENERAL.

HON. SAMUEL FIELD PHILLIPS.

[1] Mr. JUSTICE STRONG resigned Dec. 14, 1880. The Hon. WILLIAM B. WOODS was appointed Dec. 21, 1880. He took the oath of office in open court, Jan. 5, 1881.

ALLOTMENT, ETC., OF THE JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES,

AS MADE JANUARY 10, 1881, UNDER THE ACTS OF CONGRESS OF JULY 23, 1866, AND MARCH 2, 1867.

NAME OF THE JUSTICE, AND STATE FROM WHENCE APPOINTED.	NUMBER AND TERRITORY OF THE CIRCUIT.	DATE OF COMMISSION, AND BY WHOM APPOINTED.
CHIEF JUSTICE.	FOURTH.	1874.
HON. M. R. WAITE, Ohio.	MARYLAND, WEST VIRGINIA, VIRGINIA, N. CAROLINA, AND S. CAROLINA.	Jan. 21. PRESIDENT GRANT.
ASSOCIATES.	FIRST.	1858.
HON. N. CLIFFORD, Maine.	MAINE, NEW HAMPSHIRE, MASSACHUSETTS, AND RHODE ISLAND.	Jan. 12. PRESIDENT BUCHANAN.
	SECOND.	1872.
HON. WARD HUNT, New York.	NEW YORK, VERMONT, AND CONNECTICUT.	Dec. 11. PRESIDENT GRANT.
	THIRD.	1870.
HON. J. P. BRADLEY, New Jersey.	PENNSYLVANIA, NEW JERSEY, AND DELAWARE.	March 21. PRESIDENT GRANT.
	FIFTH.	1880.
HON. WM. B. WOODS, Georgia.	GEORGIA, FLORIDA, ALABAMA, MISSISSIPPI, LOUISIANA, AND TEXAS.	Dec. 21. PRESIDENT HAYES.
	SIXTH.	1862.
HON. N. H. SWAYNE, Ohio.	OHIO, MICHIGAN, KENTUCKY, & TENNESSEE.	Jan. 24. PRESIDENT LINCOLN.
	SEVENTH.	1877.
HON. J. M. HARLAN, Kentucky.	INDIANA, ILLINOIS, AND WISCONSIN.	Nov. 29. PRESIDENT HAYES.
	EIGHTH.	1862.
HON. S. F. MILLER, Iowa.	MINNESOTA, IOWA, MISSOURI, KANSAS, ARKANSAS, NEBRASKA, AND COLORADO.	July 16. PRESIDENT LINCOLN.
	NINTH.	1863.
HON. S. J. FIELD, California.	CALIFORNIA, OREGON, AND NEVADA.	March 10. PRESIDENT LINCOLN.

MEMORANDUM.

A MEETING of the members of the Bar of the Supreme Court of the United States was held in the court-room Dec. 20, 1880, to take action on the retirement of MR. JUSTICE STRONG from the Bench.

MR. PHILIP PHILLIPS was elected chairman, and MR. ASSISTANT ATTORNEY-GENERAL MCCAMMON, secretary.

MR. GEORGE H. WILLIAMS, MR. H. A. HERBERT, MR. JAMES CARR, MR. J. M. WILSON, MR. J. H. ASHTON, and MR. J. O. BROADHEAD, the committee appointed for the purpose, reported the following resolutions, which were adopted: —

Resolved, That the members of the Bar of the Supreme Court have learned with deep regret of the voluntary retirement of MR. JUSTICE STRONG, while in the full maturity of his great powers, from the labors and duties of the Bench.

Resolved, That in this termination of the agreeable and important relation he has sustained towards them they desire to express their cordial recognition of the profound learning, ripe wisdom, sincere anxiety to do justice, and absolute independence which have characterized this distinguished magistrate during his judicial career, as well as their grateful recollection of the kindly courtesy which he has constantly exhibited, and their sincere wishes for his continued health and happiness.

Resolved, That the Attorney-General be requested to present these resolutions to the Court, and ask that they may be entered on the minutes, and that they may be communicated by it to MR. JUSTICE STRONG.

Subsequently, MR. ATTORNEY-GENERAL DEVENS, in presenting the resolutions to the Court, said: —

May it please your Honors: It was with much emotion that the members of the Bar learned, at the close of the session of this court a week since, that they had seen for the last time the gracious presence of MR. JUSTICE STRONG among his associates.

That he should have determined to retire while yet in the fulness of his great powers, and with "his natural force unabated," was a resolution formed, as they well knew, in the same careful and conscientious spirit which has distinguished his whole career.

The propriety of such a decision they are not entitled to question, although they would have willingly had it postponed, that there might be postponed also the separation which it compels. They desire, in parting from him, to express

simply and unaffectedly their deep sense of the large and varied learning, the wide experience, the strong intellectual force, the rigid impartiality, of which those whose interests have been discussed here have had the full benefit, and of the unfailing courtesy and patience with which they have been listened to in representing those interests. No judicial tribunal historically known to us has ever had imposed upon it labors as grave as those imposed upon the Supreme Court by the Constitution of the United States. While, in order that it may decide, a question must be submitted in the form of a case at law or in equity, its highest duty is not alone that of deciding cases between party and party.

Its heaviest responsibility results from the fact that it is one of the three distinct branches to which the Constitution has distributed all the powers of a complete government, and that it is charged with the duty of defining, not only its own powers, but of restraining the other branches within their appropriate limits. Of the wide beneficial and permanent influence which it has exerted I shall not attempt to speak. The subject is too large, were I competent to deal with it. It is proper to observe, however, that MR. JUSTICE STRONG came upon the Bench at a most interesting period in its history. Our great civil strife was over. It had left behind, among its legacies, legislation which, even if prompted by patriotic motives, was still debated, and perhaps debatable, and the constitutional amendments intended to embody and to preserve the principles settled by it. It was a time to examine carefully compass and chart, to determine whether we had been anywhere driven from our true course, and to ascertain also the true direction and boundaries of the new course upon which we had entered. In these grave inquiries MR. JUSTICE STRONG ably bore his full share; and it will be recalled that, among many other important cases, he was intrusted by this Court with stating the reasons for its judgments in the Legal-Tender Cases in 1872, the Confiscation Cases in 1875, those involving the removal of criminal causes from the State to the United States courts, and those involving the rights of colored men to be jurors.

Whatever they may lose by the retirement of MR. JUSTICE STRONG, the members of the Bar are sensible that those upon the Bench, with whom he was associated, must lose much more. He will carry into his dignified retirement the affectionate respect of all who have known him. All that "should accompany old age, as honor, love, obedience, troops of friends," will be his, and the evening of an upright life which has been full of kindness and courtesy to all men, and of great and honorable labor in the service of the country, cannot, they trust, fail to be serene and happy.

MR. CHIEF JUSTICE WAITE, in reply, said: —

We are glad to receive from the members of the Bar this expression of their regard for JUDGE STRONG. It is but simple justice to say that, during the ten years and more he held a seat on this Bench, he never for a moment forgot what was due to the place he so ably filled. His judgments were always the result of his honest convictions of what was right, and we who have known him in the intimacy of long personal and official intercourse shall ever bear witness to his purity of character as a man and his eminent ability as a judge. We part with him on the Bench with sincere regret.

The resolutions of the Bar, with the remarks of the Attorney-General in presenting them, will be entered on the records of the Court, and we shall take pleasure in sending a copy to MR. JUSTICE STRONG, as requested.

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REPORTS OF THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1880.

MYER *v.* CAR COMPANY.

A railroad company in Iowa, after executing a mortgage to secure its bonds, which was duly recorded, covering all the property which it then possessed or might thereafter acquire, entered into a written contract with A., leasing for a specific period and at a stipulated sum, payable monthly, certain cars whereof he was the owner. It also reserved but did not exercise the privilege of purchasing them at the original cost at any time during the existence of the contract. A. retained the right to rescind the contract, if the company failed to pay the interest on its bonds. While the contract was in force, the mortgagee filed his bill of foreclosure. The court appointed a receiver, who took charge of the road and used the cars in operating it. The contract was never recorded. *Held*, 1. That the contract was binding between the parties thereto, and the failure to record it did not, under the statute of Iowa, render the cars subject to the lien of the mortgage. 2. That A. was entitled to the possession of them, and to compensation for their use by the receiver, payable out of the fund to the credit of the suit.

APPEAL from the Circuit Court of the United States for the District of Iowa.

This was a bill, filed May 4, 1875, to foreclose a mortgage executed May 12, 1871, by the Davenport and St. Paul Railroad Company, to secure the payment of certain of its bonds. The mortgage was in the usual form, covering, with other property specifically set forth, the road, bridges, and superstructure of the railroad, with all branches, side-tracks, additions, turnouts, right of way, depot grounds, and other lands then owned or thereafter to be acquired by the company; all

depots, car-houses, car-shops, machine-shops, and all other buildings whatsoever, then erected or thereafter to be erected; also all kinds of machinery and tools then held and owned or thereafter to be acquired by the company for use in connection with the railroad, including all cars or other rolling-stock or equipment, and all materials for use in constructing, operating, repairing, or replacing any part or parcel of said railroad or any part of its appurtenances; also all property and franchises connected with or relating to the railroad, or any part of its business in any wise whatever, which was then held or thereafter to be acquired by the company, &c.

The company subsequently entered into the following contract: —

"Articles of agreement concluded this first day of October, A.D. 1873, by and between the Western Car Company, party of the first part, and the Davenport and St. Paul Railroad Company, party of the second part, witnesseth:

"That for and in consideration of the promises and agreements of the said second party hereinafter mentioned, the said first party hereby hires to said second party ninety railroad cars, as follows, viz.: eighty box cars, Nos. 121 to 200 (inclusive), and ten stock cars, Nos. 301 to 310 (inclusive); said ninety cars having been the property of the Western Car Company Association, and by them delivered to the party of the second part at dates previous to Feb. 15, 1873, as per receipts of said second party, and the ownership of said cars having afterward been transferred to the party of the first part, all of said cars being marked (X/W).

"It is understood and agreed by the parties hereto that the said ninety cars are to be used by said second party in its regular business of transportation over its own and other railroads for the term of five years from the date of this contract, which shall be renewed on the expiration of said five years on like agreements and conditions as those of this contract upon the request of either of the parties hereto, a written notice of such request to be given by the party making it on the other party not less than one year previous to the expiration of said five years. In consideration whereof the said second party hereby promises and agrees —

"First, To pay the said first party as rental for the use of each of said cars twenty dollars for each and every month during the existence of this contract and its renewal, if renewed; said payments to

be made to such person on behalf of said first party as it shall designate in writing from time to time, and until otherwise so designated to the secretary of said first party; and the receipts of such payments of said person so designated, or said secretary of said first party, as the case may be, shall be the only evidence of such payments said first party shall require of said second party therefor.

"Second, In case any of said cars shall be destroyed, or so disabled by accident or otherwise as to be unfit for safe and proper use, at any time during the existence of this contract, or the renewed contract, if renewed, the said second party shall, at its *own* expense, immediately replace such destroyed or disabled cars with an equal number of like cars of equally good material, construction, and value, in all respects as were those so destroyed or disabled before the destruction or disabling of the same, and shall have said replacing cars numbered, lettered, and marked as were the said destroyed or disabled cars. Each and all of said replacing cars shall become and be the property of said party of the first part, the same as were the destroyed or disabled cars they shall have replaced.

"Third, The said second party shall, at its own expense, maintain and keep each and all of said ninety cars during the existence of this contract and its renewal, if renewed, in good repair and in safe and proper running order, and at its own expense furnish all the material for and make all renewals of said cars from time to time, as they shall be needed, to put and keep them in proper condition for regular use, said material to be in every respect equal in quality to the material for like purposes originally used in the construction of said cars, and at the termination of this contract or the renewed contract, if renewed, return said cars to the party of the first part in proper condition and repair for the immediate and active use thereof.

"It being understood and agreed between the parties to this contract that said second party may and hereby reserves the privilege of purchasing said cars at any time during the existence of this contract, or the renewal thereof, if renewed, by paying, or securing to be paid to said first party, to its satisfaction, the original cost thereof.

"It is understood and agreed between the parties hereto that to preserve the evidence of the ownership of said cars in the said first party they shall be severally marked or lettered as follows, viz. (W), which shall be in addition to any marking or lettering of said

cars said second party may make for its convenience. In case the said second party shall fail at any time during the existence of this contract, or the renewed contract, if renewed, to promptly pay the interest or the principal of any of its bonds or other liabilities when the same shall have respectively become due, the said first party may, if it so elect, terminate this contract immediately after such default, by written notice of the president of said first party to the president or secretary of said second party, personally served on said president or secretary, or sent to either of them by the United States mail, and the said second party agrees on the service of said written notice as aforesaid to deliver forthwith to said first party the actual possession as the owner thereof of each and all of said ninety cars, and those with which said second party shall have replaced the same, each and all of which cars shall, on such delivery, be in proper condition and repair for the immediate and active use thereof.

"THE WESTERN CAR COMPANY,
"By B. E. SMITH, *Pres't.*

"Attest:
"E. C. SMITH, *Sec'y.*

"THE DAVENPORT & ST. PAUL R. R. CO.,
"By GEO. H. FRENCH, *Pres't.*

"Attest:
"J. S. CONNOR, *Sec'y.*"

The court appointed a receiver, who took charge of the road and said cars.

The Western Car Company filed an answer and a cross-bill claiming title and right of possession to the cars, and compensation for the use of them by the receiver. The Western Car Company Association originally leased ninety cars to the railroad company, and became a corporation under the name of The Western Car Company, under a charter granted by the State of Delaware. An agreed statement was filed in the court below, setting forth the following facts: The cars were delivered to the railroad company under a conditional contract or lease with the Western Car Company Association, between Feb. 8, 1872, and Feb. 15, 1873; $22,179.02 was paid for the rent thereof prior to Oct. 1, 1873, under a similar lease or contract to that of Oct. 1, 1873; the Western Car Company was formed at or prior to Oct. 1, 1873, and the foregoing contract was executed between it and the railroad company; the words

"having been the property of the Western Car Company Association, and by them delivered" to the said railroad company, mentioned in that contract, refer to the delivery above named, and the car company claims title to and rent for the cars under the contract of Oct. 1, 1873. The trustees of the bondholders claim title under the mortgage dated May 12, 1871, which was duly recorded. The contract of Oct. 1, 1873, was never recorded. The receiver has paid no rent for the cars, and they were marked as stated in that contract.

The cars were all in use by the railroad company, and were constantly passing, in and for its business to Chicago and back, on the Chicago and Northwestern Railroad, and in carrying and earning freight for the Davenport and St. Paul road up to the time of the receiver's appointment. Some parties, in a proceeding against the Chicago and Northwestern Railroad Company, garnished the cars, and the court below made an order on that company to deliver them to the receiver. Before the order was executed, the car company applied to the court to direct a payment of rent to them by the receiver. When the court refused to do so, that company, through the same attorneys who applied for rent, replevied fifty-eight of the cars from the Chicago and Northwestern Railroad Company by writ from the Circuit Court of the United States for the Northern District of Illinois. B. E. Smith was, Oct. 1, 1873, president of the car company, and of the Davenport Railway Construction Company, and a stockholder in the Davenport and St. Paul Railroad Company. At that date, George H. French was president of the latter company, and secretary of the Construction Company.

It was further agreed that if the court decided that the car company was entitled to the cars, the amount of rent was to be fixed by a reference to such competent person as the court might select.

The court found that the said ninety cars leased by the railroad company from the Western Car Company, at all times had been and then were the property of the latter company, and that it was entitled to the immediate possession thereof. The court thereupon adjudged that the complainants' bill be dismissed as against the car company.

The court further found that of the said ninety cars fifty-six had come into the possession of the car company under and by virtue of said writ of replevin; that thirty-four of them were then, and had been since the filing of the bill, in the possession of the receiver appointed by the court, but that two of them were subject to the lien of the deed of trust under which the complainants claim. It was adjudged and decreed that the receiver immediately surrender and deliver up unto the car company the remaining thirty-two cars.

It having been stipulated by the parties that the value of the use of the said thirty-two cars, since and while they were in the possession of and in use by the receiver of the court, was $10 per car for each month since March, 1875, a period of twenty-six months, it was further adjudged and decreed that the car company do have and recover for such use the sum of $8,320; and the receiver was ordered and directed to pay over the said moneys to the said company.

Myer and Dennison, the trustees named in the mortgage, thereupon appealed to this court.

Sect. 1922 of the Revised Code of Iowa of 1873 is as follows:—

"That no sale, contract, or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee or lessee in actual possession obtained in pursuance thereof, without notice, unless the same be in writing, executed by the vendor or lessor, acknowledged and recorded the same as chattel mortgages."

It is a transcript of an act having for its title "An Act requiring conditional sales of personal property to be executed, acknowledged, and recorded like mortgages of personal property, to be of any validity as against *bona fide* purchasers, executions, and attaching creditors."

Mr. Joseph H. Choate and *Mr. James Grant* for the appellants.

By the true and fair construction of its terms, the statute of Iowa applies to this case. It invalidates the title or right of recovery of the lessor, as against the prior mortgagees, and

makes their title as creditors superior to that of the actual owner.

a. The title of the original act does not control the enacting clause. The latter is free from all ambiguity, and secures the benefit of its provisions to "any creditor." Potter's Dwarris on Statutes, pp. 265–270; *Mace* v. *Cadell*, Cowp. 232; Sedgwick, Statutes, pp. 50–52.

b. Although *United States* v. *New Orleans Railroad* (12 Wall. 362) holds that, as a general rule of equity, the mortgagee in such a mortgage must take after-acquired property *cum onere*, the express terms of this statute create a clear exception to that rule. *United States Wind Engine Co.* v. *Burlington, &c. Railway Co.*, 4 Dill. 580.

c. The contract in question comes directly within those terms. It is "a contract or lease wherein the transfer of title or ownership of personal property is made to depend upon a condition," and the "lessee or vendee was in actual possession, obtained in pursuance thereof without notice" to creditors.

The condition, on which the transfer of title is made to depend, is the payment of the original cost. At any time during the lease, by performing this condition, the lessee is to become the owner of the cars.

The purposes of the statute are to be considered. Like all similar legislation which aims at prohibiting the separation of the apparent or reputed title from the real ownership, it is to be construed for the prevention of fraud upon creditors and others, who rely upon the apparent ownership, which the possession and use of chattels indicate. Had an actual purchaser bought and paid for the cars, there can be no question that his title would be sustained as against the real owner, and the statute expressly puts "any creditor" in the same position.

The principle of such statutes is that a divorce of the apparent ownership, manifested by possession, from the actual ownership, shall not avail as against creditors who rely upon the possession.

In *Twyne's Case* (3 Co. 87), it was resolved that such statutes made against fraud must be liberally and beneficially expounded, and that the whole instrument must be taken together to ascertain its meaning.

The statute of Iowa does not contemplate a consummated sale and purchase, but a contract or lease whereby the transfer of title is made to depend upon a condition. This exact feature is found in this contract. Whenever the lessee pays or secures the original cost of the cars, they are to be its property. This is an executory agreement binding on the lessor during the whole term of the lease. The statute dispenses in favor of creditors of the lessee with the performance of the condition, if the contract, as in this case, be not recorded.

Leases wherein payment of rent to the amount of a fixed purchase-price is stipulated for have frequently been held to be within the statute. *Sewing-Machine Company* v. *Holcomb*, 40 Iowa, 33; *Mosely* v. *Shattuck*, 43 id. 540; *Lucas* v. *Campbell*, 88 Ill. 447; *Latham* v. *Sumner*, 89 id. 233; *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664. The distinguishing feature of these cases is that the rent for which the lessee is bound is paid and received as part of the purchase-money, and that when he, by paying the whole amount, has performed the condition on which the transfer of title is made to depend, the property becomes his.

The statute of Iowa covers not only that case, but every case where the contract under which possession is taken contains a condition on the performance of which the title is to pass to the party in possession, although he may not be bound to perform the condition.

A conditional sale does not require a mutual and binding agreement of sale and purchase. It means an agreement of sale, provided the contemplated purchaser performs the prescribed condition. *Horn* v. *Baker*, 9 East, 215; *Strong* v. *Taylor*, 2 Hill (N. Y.), 326; *Herring* v. *Willard*, 2 Sandf. (N. Y.) 418.

The court cannot, to palliate the supposed hardships of a particular case, annul the express provisions of the statute of Iowa. This it would do if it held that Myer and Dennison were not "creditors" in the sense of that statute.

d. The lease provides that the lessee may at any time during its continuance become the owner of the cars on payment of the original cost. Is not some light shed upon this

singular provision by the stipulation filed in the court below showing that the actual value of the rent of them was just one-half of that reserved by the lease? Doubtless, therefore, long before the receiver took possession, the lessor had received in excessive rent their full original cost, and the plea of hardship in losing them wholly fails.

Mr. Robert G. Ingersoll and *Mr. John M. Butler, contra.*

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

We consider it unnecessary to decide in this case whether a lease of personal property at a specified rent, with an option in the lessee to buy for a fixed price, is in legal effect a conditional sale; because, even if it be, the decree below is in our opinion right. In *Fosdick* v. *Schall* (99 U. S. 235), a case which came up from Illinois, we decided that such a contract of sale, if not recorded in accordance with the requirements of the chattel-mortgage acts, was legal and valid as between the parties, and that under a mortgage reaching after-acquired property the mortgagee would take such property subject to all the conditions with which it was incumbered when it came into the hands of the mortgagor. The statute we were then considering was as follows: —

"That no mortgage, trust-deed, or other conveyance of personal property, having the effect of a mortgage or lien upon such property, shall be valid as against the rights and interests of any third person, unless possession thereof shall be delivered to and remain with the grantee, or the instrument shall provide for the possession of the property to remain with the grantor, and the instrument is acknowledged and recorded as hereinafter directed; and every such instrument shall, for the purposes of this act, be deemed a chattel mortgage." Rev. Stat. Ill., 1874, p. 711.

Under this statute the courts of Illinois have uniformly held that contracts of conditional sale are in effect, so far as the chattel-mortgage acts are concerned, the same as though a formal bill of sale had been executed and a mortgage given back to secure the purchase-money. So that the question we were then called on to decide was whether one holding as a

mortgagee of after-acquired property was a "third person" within the meaning of that law.

The statute of Iowa which is involved in the present case is as follows: —

"That no sale, contract, or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee or lessee, in actual possession obtained in pursuance thereof, without notice, unless the same be in writing, executed by the vendor or lessor, acknowledged and recorded the same as chattel mortgages." Code of 1873, sect. 1922, p. 356; Acts of Fourteenth General Assembly, c. 63, p. 69.

It will thus be seen that the statutes of the two States are substantially alike, unless a different meaning is given the term "third person," used in the one, from that of "creditor or purchaser," found in the other. If these terms are the same in legal effect, the principal question involved in this case has already been settled here.

In *Fosdick* v. *Schall* we held that a mortgagee whose mortgage embraced property to be acquired in the future was in no sense a purchaser of such property. His rights were not granted after the property was bought by the mortgagor. He got nothing by this provision in his mortgage except what the mortgagor himself had acquired. He paid nothing for his new security. He took as mortgagee just such title as the mortgagor had; no more, no less. The code of Iowa, sect. 1283, authorized mortgages of property afterwards to be acquired, and made them as valid and effectual as if the property were in possession at the time of the execution thereof; but this does not change the case. The question still is, what property has been acquired to which the mortgage can attach.

We think, therefore, that the word "purchaser" in the Iowa statute gives the appellants no rights other than those to which they would be entitled under like circumstances in Illinois.

Every mortgagee is necessarily a creditor. A mortgage is in general but an incident to the debt it secures, and the mortgagee is nothing more than a creditor secured by mort-

gage. These appellants are mortgagees; but, as has just been seen, their mortgage gives them no rights to the property in dispute against the car company, the lessor, or conditional vendor. Their claim is only such as belongs to creditors of the railroad company, the lessee, or conditional vendee. So far as any rights they have as simple creditors are concerned, the railroad company could do with the property just what it pleased. It might have been surrendered to the car company or sold to another. The car company, too, could have taken possession under its lien, and held against any proceeding these creditors might afterwards commence as mere creditors. Unless a creditor is in a condition to prevent the vendee from controlling his property, he is powerless, and the vendor and vendee may contract with each other as they please without consulting him. It follows that although the word "creditor" appears in the statute, it must have been used with some limitation. This makes it necessary to inquire what that limitation was.

The statute as we now find it is part of the code of Iowa adopted in 1873. This code, like the Revised Statutes of the United States, was in reality only a convenient compilation or codification of laws before that time in force. In the brief of counsel for the appellants, it is stated in terms that the particular section of the code now in question (sect. 1922) is a copy of chapter 63 of the acts of the Fourteenth General Assembly.

In relation to the Revised Statutes of the United States, we held, in *United States* v. *Bowen* (100 U. S. 508), that "when it becomes necessary to construe language in the revision which leaves a substantial doubt as to its meaning, the original statute may be resorted to for the purpose of ascertaining that meaning." The same rule is applicable to the Iowa code, and there is a substantial doubt here as to what the word "creditor" means. Looking then to the original act, we find the text the same as the code; but the title, omitted in the codification, is as follows: "An Act requiring conditional sales of personal property to be recorded like mortgages of personal property to be of any validity as against *bona fide* purchasers, execution and attaching creditors." In cases of doubt the title

might always be resorted to for the purpose of ascertaining the meaning of the body of the act; but especially is this true in States like Iowa, where the constitution provides that "every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." Art. 3, sect. 29. This leaves no doubt, and clearly confines the operation of the text to such creditors as have by suit perfected a right to impeach the transaction. Such has always been the rule in respect to conveyances made to hinder and delay creditors. Until suit was commenced, the parties were at liberty to deal as they pleased with the property conveyed, and the rights of creditors were determined by the condition in which the property was when they interfered. It is clear, therefore, that these appellants, as creditors at large, had acquired no such special interest in the property, when their bill to foreclose their mortgage was filed, as would give them the right to contest the validity of the car company's title. As against them, in the condition they were, the lien created by the conditional sale was to all intents and purposes valid and subsisting when the receiver, on his appointment, took possession of the property; and his possession, as we said in *Fosdick* v. *Schall*, was for the benefit of whomsoever in the end it should be found to concern. The rights of the parties were fixed at the moment the property was taken by the court through its receiver into its own possession. At that time these appellants were not either execution or attaching creditors. They had not then, neither have they since, sued as any other than mortgage creditors endeavoring to enforce their mortgage lien. We conclude, therefore, that the statute of Iowa has a no more extended operation, so far as the circumstances of this case are concerned, than that of Illinois, and that under our former decision the appellants stand precisely where the railroad company would in a controversy with its vendor. To our minds it is unimportant that under the railroad mortgage laws of Iowa "the rolling-stock and personal property of the company, properly belonging to the road and appertaining thereto,

shall be deemed a part of the road," for the purposes of a mortgage. Such personal property is still "loose property, susceptible of separate ownership and separate liens," and it is only such interest as "properly belongs" to the company that the authorized mortgage reaches. The evident purpose of the act was to do no more than prevent confusion growing out of any difference there might be between recording acts having reference to personal property and those affecting real estate. This disposes of the principal question in the case.

The money recovery below was only for the use of the cars by the receiver during the receivership, and the amount was substantially agreed on. In other words, it is in effect admitted that the use of the cars was worth to the court while operating the road under the trust created by the appointment of a receiver, at the instance of these appellants, just what has been decreed. There can be no doubt that it is the duty of a court to pay from the trust fund it has in possession all the debts it incurred in its judicial capacity while administering the trust assumed, pending the litigation, in behalf of the litigating parties. The objection here is not that the fund in hand did not incur the debt, the payment of which has been ordered, but that the railroad company, while operating the road before the receivership, paid the car company too large a sum for the use of its cars, and that the debt of the fund should be reduced by the amount of this improvident and excessive payment. There is nothing in the case as it has been brought here by the appeal which will enable us to determine whether the car company ought to contribute anything to the fund in court on this account or not. It is sufficient for our purposes on this appeal that an authorized officer of the court has in a legitimate way charged the fund in hand with the debt, the payment of which has been ordered, and that it has not been proved that the car company owes the railroad company for over-payments made before the receivership was created.

It is impossible for us to determine from anything now here whether the receiver is indebted to the car company for the use of the cars in question after the decree below, or whether the purchaser of the railroad property under the mortgage has used the cars pending the appeal, or that he can, in this suit,

be required to make compensation therefor. All those questions will properly come before the court below for determination on the law and the facts when the case goes down.

Decree affirmed.

RAILROAD COMPANY v. NATIONAL BANK.

1. The judgment in an action brought by the holder of negotiable paper against the indorsers, is not a bar to his subsequent action against the maker, who was not notified of the pendency of the first action.
2. An estoppel by judgment is equally conclusive upon all the parties to the action and their privies, and may not be invoked or repudiated at the pleasure of one of them as his interest may require.
3. The transfer by indorsement to a creditor of negotiable paper before maturity, merely as security for an antecedent debt, although it is without his express agreement for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of the debt. In neither case is the *bona fide* holder affected by equities or defences between prior parties of which he had no notice.
4. The courts of the United States are not controlled by the decisions of State courts on questions of general commercial law. *Swift* v. *Tyson* (16 Pet. 1) and *Oates* v. *National Bank* (100 U. S. 239) reaffirmed.

ERROR to the Circuit Court of the United States for the Southern District of New York.

This was an action by The National Bank of the Republic of New York against The Brooklyn City and Newtown Railroad Company.

The case, as made by an agreed statement of facts, is this:—

The company, a corporation organized under the laws of New York, executed, at Brooklyn, in that State, May 9, 1873, its promissory note for the sum of $5,000, payable four months after date to the order of William V. LeCount, its treasurer, at the Atlantic State Bank of Brooklyn. It was indorsed in blank, first by him, and then by Palmer & Co., a firm composed of Thomas Palmer, Jr., and Anson S. Palmer, the former being the president and the latter the financial agent of the company, and together owning the larger portion of its stock. It was made for the purpose only of raising money thereon for the company. Neither LeCount nor Palmer & Co.

received any consideration for their respective indorsements. The note thus indorsed was, with others, placed by the company in the hands of Hutchinson & Ingersoll, a firm of note-brokers in Wall Street, for negotiation and sale.

Prior to the execution of the note Hutchinson & Ingersoll had frequently borrowed money from the bank. They, however, kept no account, and had no transactions with it, other than those to which reference will now be made.

In the month of October, 1872, the bank first made them a call loan at seven per cent interest, of $25,000, on collaterals. Subsequently, in 1873, it made to them other call loans on collaterals, at the same rate of interest, as follows: March 11, $15,000; March 15, $10,000; April 11, $10,000; May 16, $10,000; May 20, $20,000; May 23, $10,000; June 4, $15,000; June 6, $12,000; June 12, $10,000; June 19, $36,000; and July 11, $10,000. Each of these loans was a separate one, upon a particular and distinct lot of collaterals. Hutchinson & Ingersoll were in the habit of borrowing money from various banks and from individuals or firms upon specific lots of collaterals.

The loan of $36,000 on 19th June, 1873, was upon several notes as collateral security, among them the above-described note for $5,000, executed May 9, 1873. All the loans by the bank, prior to the one of $36,000, had been paid off before that loan was made.

The loan of $10,000 on 11th July, 1873, was upon the following notes as collateral security: Two notes of Howes, Hyatt, & Co. for $2,605.98 and $3,540.15, and two of H. L. Ritch & Co. for $3,320.17 and $2,146.92.

On the 22d of July, 1873, Howes, Hyatt, & Co. having become insolvent, Hutchinson & Ingersoll executed and delivered to the bank, at its request, antedated to June 19, 1873 (which was the date of the $36,000 loan), a written instrument, whereby they agreed with the bank "that all securities, bonds, stocks, things in action, or other property or evidences of property whatsoever, which have been or may at any time hereafter be deposited or left by us or on our account, with said bank, whether specifically pledged or not, may be held by said bank, and shall be deemed to be and are hereby pledged

as security for the payment of any and every indebtedness, liability, or engagement on our part, held by said bank, and that on the non-payment, when due and payable, of any sum or sums of money which have been or may hereafter be by said bank lent, paid, or advanced to or for the account or use of us, or for which we are or may become in any way liable or indebted to said bank, the said bank, or its president or cashier, may immediately thereupon, or at any time thereafter, sell, &c., . . . and apply the net proceeds of sale to the payment of any sum or sums due and payable from us to said bank, and hold any surplus of such net proceeds, together with any and all remaining securities, property or evidences of property, then held by said bank and not sold, as security for the payment of any and all other of our then existing and remaining liabilities and engagements to said bank."

When that writing was executed, no agreement was made to extend the loan, or to refrain from calling it in.

The bank knew that Hutchinson & Ingersoll were note-brokers, but until Aug. 8, 1873, had no knowledge or information of the connection of the Palmers with the railroad company, or of the circumstances attending the making or indorsement of the note in suit, or of the purpose thereof, or of any relations, dealings, or communication between Hutchinson & Ingersoll, and the parties to the note (except that they knew Hutchinson & Ingersoll to be note-brokers), or that the note was anything else than ordinary business paper, or that there was any question as to the right of said Hutchinson & Ingersoll to pledge or negotiate it. Nor did the railroad company know or suspect that the firm had parted with or hypothecated said note until Aug. 15, 1873.

The company, by reason of certain advances made to its use, by Hutchinson & Ingersoll, became indebted to the latter, on the 8th of August, 1873, in the sum of $600. On the fifteenth day of August, 1873, it tendered that sum to the firm, and demanded a return of the $5,000 note. During the same month it made a like tender to the bank, and demanded the note.

The $36,000 loan was paid in full out of the collaterals given to secure its payment, as they respectively matured, without resorting to the note in suit, the first payment of $4,580 being

July 22, 1873, and the last payment being April 4, 1874, leaving the $5,000 note in the bank's possession.

Hutchinson & Ingersoll are insolvent. The collaterals collected exceeded the $36,000 loan by $2,403.61.

On the $10,000 loan of July 11, 1873, there was a balance due the bank, Nov. 21, 1876, of $5,136.68 after exhausting all collaterals in its possession which had been specially pledged to secure that loan, and crediting the amount, with interest collected, of a certain judgment to be now referred to.

In 1874, the bank sued Palmer & Co., as indorsers upon the note in suit, in the Supreme Court of New York. The case was sent to a referee, who rendered judgment in favor of the bank for $601, which seems to be the amount due from the railroad company to Hutchinson & Ingersoll. That judgment, with the costs, was satisfied.

The present action is by the bank against the railroad company to recover the amount of the $5,000 note executed by the latter on the 9th of May, 1873, and placed in the hands of Hutchinson & Ingersoll for sale for the benefit of the company. It was agreed that, if the company is liable to the bank upon that note, the amount would be as of Nov. 21, 1876, $5,136.68.

The court below gave judgment for the bank, and the company sued out this writ.

Mr. William Dorsheimer for the plaintiff in error.

The matter is *res judicata*, for there was a determination, by the Supreme Court of New York, upon the same subject-matter in a controversy between the same parties or their privies. It is true that the defendants there were not the makers of the note. Although makers and indorsers may have independent interests, yet they, in this instance, are privies. The note never had any valid inception. The making and indorsing were alike without consideration. Neither the maker nor the indorsers could incur any liability on the note, except such as might arise from the unauthorized action of Hutchinson & Ingersoll in pledging it to the bank.

The term "privies" is not confined to persons interested in real estate (3 Tomlin, Law Dict. 218; 2 Bouv. 382), nor is it true that only the same parties, *eo nomine*, are bound by a judgment. *Green* v. *Clark*, 5 Den. (N. Y.) 497; s. c. 13 Barb

(N. Y.) 57; *Kent* v. *Hudson River Railroad Co.*, 22 id. 278; *Taylor* v. *Spader*, 48 N. Y. 664. The expression "parties" is not confined to the parties to the record. It includes all those who have a direct interest in the subject-matter of the suit. *Bates* v. *Stanton*, 1 Duer (N. Y.), 87; *Ehle* v. *Bingham*, 7 Barb. (N. Y.) 494.

Even if the judgment be not construed as *res judicata*, in the strict sense, the bank is estopped from proceeding further with this action. It selected its own tribunal, abided by the judgment there rendered, and entered satisfaction of it, after accepting the money which the court determined to be the whole amount due upon the note. The claim was extinguished by that acceptance and satisfaction. *Woodworth* v. *Spofford*, 2 McLean, 168; *Sedam* v. *Williams*, 4 id. 51; *King* v. *Hoare*, 13 Mees. & W. 449; *Farrell* v. *Hibbard*, 3 N. H. 318.

This case was tried upon similar pleadings, and the same state of facts as that, with the single exception of the paper signed July 22, 1873, which would not have varied the result there, and in no way strengthens the case here. It was signed long after both loans had been made, was without consideration, and no action was taken upon it. The bank did not agree to extend the loan, nor did it refrain from calling it in. It must be conceded that, under the adjudications in New York, the bank was not in that case entitled to recover more than the sum awarded, unless it had a lien upon all the securities of Hutchinson & Ingersoll, which was termed in the decision a "banker's lien." Its relations with them were not those of banker and customer, and such a lien could not, therefore, attach. They were not depositors or dealers with the plaintiff, and kept no account there. In the cases where the question of such a lien has arisen, the party asserting it was a banker *quoad* the person from whom the security had been acquired. In some of them, the lien was claimed under special circum stances, as on a pledge, but no *banker's* lien can arise, unless the relation of banker and customer exists. The banker in England is the general financial agent of the customer. Even there the lien would not apply to a case like this, though the parties did actually occupy the legal relation of banker and customer. *Davis* v. *Bowsher*, 5 T. R. 488; *Brandas* v. *Barnett*,

12 Cl. & Fin. 787; *Jones* v. *Peppercorn*, 1 John. 430, *Bolland* v. *Bygrave*, 1 Ry. & M. 271; *In re European Bank, Agra Bank Claim*, Law Rep. 8 Ch. 41.

Outside of the question as to the asserted specified lien of a "banker" the plaintiff cannot recover. *Ocean Bank* v. *Scott*, 23 N. Y. 293; *Clarke* v. *Lawrence*, 36 id. 118; *McBride* v. *Farmers' Bank*, 26 id. 450; s. c. 25 Barb. (N. Y.) 657; *Van Namee* v. *Bank of Troy*, 8 id. 312; *West* v. *American Exchange Bank*, 44 id. 175; *American Exchange Bank* v. *Corlies*, 46 id. 19; *Farrington* v. *Franklin Bank*, 24 id. 559; *Neponset Bank* v. *Leland*, 5 Metc. (Mass.) 259; Story, Agency, sect. 381; *Commercial Bank* v. *Marine Bank*, 3 Keyes (N. Y.), 337; *Bay* v. *Coddington*, 5 Johns. (N. Y.) Ch. 54; s. c. 20 Johns. (N. Y.) 637.

These decisions all affirm this doctrine, and it may be now considered as the settled law of the State of New York.

The plaintiff relied upon *Swift* v. *Tyson*, 16 Pet. 1.

1. An examination of that case will show that the acceptance sued upon was, with another, transferred *in payment of* a promissory note, which *was given up* when they were received. All that was there decided is, that an innocent third party may acquire a title to a note if he takes it in *payment of* a pre-existing debt, as well as if he makes an immediate advance upon it.

2. But conceding, for the purposes of the argument, that a party receiving a note as additional security to an existing claim takes it free from the equities between antecedent parties, this is not such a case. The note was given as such security for a loan, which has been since paid. The right of recovery cannot extend to a subsequent and independent loan made upon different collaterals.

3. The cases in the English books relied upon below were those of continuing loans or balances. In other words, the party holding the notes had done, or omitted to do, some act on the faith thereof.

Here there was no agreement to extend the second loan.

An examination of *Swift* v. *Tyson* shows that the point was taken on the argument that "the acceptance of the bill of exchange by the defendant having been given in New York, the contract was to be regulated by the laws of that State." The

reporter says: "This question was not brought before the court by the certificate of division."

In the case at bar the question is clearly presented. Inasmuch as these parties are both residents of New York, and the contract was made there, and the plaintiff resorted to her tribunals for the assertion of its rights, and obtained a judgment upon which it received payment, and gave satisfaction, the case should be determined by the *lex loci contractus;* and this court, it is submitted, should accept the decisions of the courts of that State as governing this case.

Mr. Thomas H. Rodman, contra.

The doctrine in *Swift* v. *Tyson* (16 Pet. 1) is explicit and decisive in favor of the plaintiff. It was reaffirmed and enforced in *McCarty* v. *Roots* (21 How. 432), and has been adopted and applied in the State courts. *Quinn* v. *Hard*, 43 Vt. 375; *Russell* v. *Splater*, 47 id. 273; *Atkinson* v. *Brooks*, 26 id. 569; *Fisher* v. *Fisher*, 98 Mass. 303; *Stoddard* v. *Kimball*, 6 Cush. (Mass.) 469; *Roberts* v. *Hall*, 37 Conn. 205; *Bank of Republic* v. *Carrington*, 5 R. I. 515; *Williams* v. *Little*, 11 N. H. 66; *Bowman* v. *Millison*, 58 Ill. 36; *Manning* v. *McClure*, 36 id. 490; *Payne* v. *Bensley*, 8 Cal. 260; *Giovanovich* v. *Citizens' Bank*, 26 La. Ann. 15; *Smith* v. *Isaacs*, 23 id. 454; *Allaire* v. *Hartshorne*, 21 N. J. L. 665; *Armour* v. *McMichael*, 36 id. 92; *Maitland* v. *Citizens' National Bank of Baltimore*, 40 Md. 540; *Robins* v. *Lair*, 31 Iowa, 9; *Bonaud* v. *Genesi*, 42 Ga. 639.

If the pledge of June 19, 1873, had not been made, the plaintiff, organized and doing business as a national banking association, would have had the right to hold the note in suit for the deficiency on the second loan. Hutchinson & Ingersoll were in the habit of borrowing money of the plaintiff on collaterals. A banker has a lien for a general balance (*In re European Bank, Agra Bank Claim*, Law Rep. 8 Ch. 41), and it is not excluded by a special contract, unless the latter be inconsistent therewith.

The defence of a former recovery is not tenable. The judgment was not rendered in a suit between the same parties, and there is no privity between maker and indorser to which the doctrine of estoppel applies. Bigelow, Estoppel, 75. A judgment against the indorser of a note does not discharge the maker.

Russell & Erwin Manuf. Co. v. *Carpenter*, 5 Hun (N. Y.), 162; *Pritchard* v. *Hitchcock*, 6 Man. & G. 151.

The plaintiff's claim was not satisfied by the payment of the judgment against the indorsers for a part of the debt. Part payment by, and release of, the indorser does not discharge the maker. Story, Promissory Notes, sect. 422, note 2; *Commercial Bank* v. *Cunningham*, 24 Pick. (Mass.) 270.

MR. JUSTICE HARLAN, after stating the facts, delivered the opinion of the court.

The first proposition of the plaintiff in error is that there has been a final determination by a court of competent jurisdiction, between the same parties or their privies, upon the same subject-matter as that here in controversy. This contention rests upon the judgment of the Supreme Court of New York, in the action instituted by the bank against Palmer & Co., as the indorsers of the note in suit.

The judgment in the State court clearly constitutes no bar to the present action. Personal judgments bind only parties and their privies. The railroad company was not a party to the separate action against Palmer & Co., nor did it receive notice from the latter of the pendency of that suit. It was, therefore, in no manner affected by the judgment. Had the company received such notice in due time, it would, perhaps, although not technically a party to the record, have been estopped, at least as between it and its accommodation indorsers, from saying that the latter were not bound to pay the judgment, if obtained without fraud or collusion. Being, however, an entire stranger to the record, it had no opportunity or right, in that proceeding, to controvert the claim of the bank, to control the defence, to introduce or cross-examine witnesses, or to prosecute a writ of error to the judgment.

If, in the action against Palmer & Co., the bank had obtained judgment for the full amount of the note, and, being unable to collect it, had sued the railroad company, the latter would not have been precluded by the judgment in that action, to which it was not a party, and of the pendency of which it had not been notified, from asserting any defence it might have against the note. This being so, it results that the company cannot plead

the judgment in the State court as a bar to this action. An estoppel, arising out of the judgment of a court of competent jurisdiction, is equally conclusive upon all the parties to the action and their privies. It may not be invoked or repudiated at the pleasure of one of the parties, as his interest may happen to require.

The liability of the maker and indorsers was not joint, but several, and, therefore, a judgment in an action against the indorsers, upon the contract of indorsement, could not bar a separate action by the bank against the maker,—certainly not, where the maker was without notice from the indorsers of the pendency of the action against them.

The next proposition involves the right of the railroad company to show, as against the bank, that the note was executed and delivered to Hutchinson & Ingersoll for the purpose only of raising money upon it for the company, and that, consequently, they had no authority to pledge it as collateral security for their own indebtedness to the bank. It will have been observed, from the statement of facts, that the note in suit was among those pledged to the bank as security for the call loan of $36,000, made June 19, 1873; that Howes, Hyatt, & Co., whose notes had been pledged as security for the call loan of $10,000, made June 19, 1873, having become insolvent, Hutchinson & Ingersoll, July 22, 1873, at the request of the bank, executed the writing, dated June 19, 1873, whereby they pledged all securities, bonds, stocks, things in action, or other property theretofore deposited with the bank, whether specifically or not, as security for the payment of any and every indebtedness, liability, or engagement held by the bank, for which they were, or should become, in any way liable. Although, therefore, the call loan of $36,000 was extinguished, without resorting to the note in suit, that note, under the agreement made July 22, 1873, stood pledged as collateral security, also, for the $10,000 call loan of July 11, 1873.

The bank, we have seen, received the note, before its maturity, indorsed in blank, without any express agreement to give time, but without notice that it was other than ordinary business paper, or that there was any defence thereto, and in ignorance of the purposes for which it had been executed and

delivered to Hutchinson & Ingersoll. Did the bank, under these circumstances, become a holder for value, and as such entitled, according to the recognized principles of commercial law, to be protected against the equities or defences which the railroad company may have against the other parties to the note?

This question was carefully considered, though, perhaps, it was not absolutely necessary to be determined, in *Swift* v. *Tyson*, 16 Pet. 1. After stating that the law respecting negotiable instruments was not the law of a single country only, but of the commercial world, the court, speaking by Mr. Justice Story, said: "And we have no hesitation in saying that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated as applicable to negotiable instruments. Assuming it to be true (which, however, may well admit of some doubt from the generality of the language) that the holder of a negotiable instrument is unaffected with the equities between antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business for a valuable consideration, before it becomes due, we are prepared to say that receiving it in payment of *or as security for a pre-existing debt* is according to the known usual course of trade and business. And why, upon principle," continued the court, "should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of and as security for pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor, also, has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper cannot be applied in payment of or as security for pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrass-

ment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuity to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine would become of that large class of cases where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them which have arrived at maturity? Probably more than one-half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts."

After a review of the English cases, the court proceeded: "They directly establish that a *bona fide* holder, taking a negotiable note in payment of *or* as security for a pre-existing debt, is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties."

The opinion in that case has been the subject of criticism in some courts, because it seemed to go beyond the precise point necessary to be decided, when declaring that the *bona fide* holder of a negotiable note, taken as collateral security for an antecedent debt, was protected against equities existing between the original or antecedent parties. The brief dissent of Mr. Justice Catron was solely upon that ground, which renders it quite certain that the whole court was aware of the extent to which the opinion carried the doctrines of the commercial law upon the subject of negotiable instruments transferred or delivered as security for antecedent indebtedness. In the judgment of this court, as then constituted (Mr. Justice Catron alone excepted), the holder of a negotiable instrument, received before maturity, and without notice of any defence thereto, is unaffected by the equities or defences of antecedent parties, equally whether the note is taken as collateral security for or in payment of previous indebtedness. And we understand the case of *McCarty* v. *Roots* (21 How. 432) to affirm *Swift* v. *Tyson*, upon the point now under consideration. It was there said: "Nor does the fact that the bills were assigned to the plaintiff as collateral security for a pre-existing debt impair the plaintiff's right to recover." p. 438. "The delivery of the

bills to the plaintiff as collateral security for a pre-existing debt, under the decision of *Swift* v. *Tyson*, was legal." p. 439.

It may be remarked in this connection that the courts holding a different rule have uniformly referred to an opinion of Chancellor Kent in *Bay* v. *Coddington* (5 Johns. (N. Y.) Ch. 54), reaffirmed in *Coddington* v. *Bay*, 20 Johns. (N. Y.) 637. There is, however, some reason to believe that the views of that eminent jurist were subsequently modified. In the later editions of his Commentaries (vol. iii. p. 81, note *b*), prepared by himself, reference is made to *Stalker* v. *McDonald* (6 Hill (N. Y.), 93), in which the principles asserted in *Bay* v. *Coddington* were re-examined and maintained in an elaborate opinion by Chancellor Walworth, who took occasion to say that the opinion in *Swift* v. *Tyson* was not correct in declaring that a pre-existing debt was, of itself, and without other circumstances, a sufficient consideration to entitle the *bona fide* holder, without notice, to recover on the note, when it might not, as between the original parties, be valid. But Chancellor Kent adds: "Mr. Justice Story, on Promissory Notes, p. 215, note 1, repeats and sustains the decision in *Swift* v. *Tyson*, and I am inclined to concur in that decision as the plainer and better doctrine." Of course it did not escape his attention that the court in *Swift* v. *Tyson* declared the equities of prior parties to be shut out as well when the note was merely pledged as collateral security for a pre-existing debt, as when transferred in payment or extinguishment of such debt.

According to the very general concurrence of judicial authority in this country as well as elsewhere, it may be regarded as settled in commercial jurisprudence — there being no statutory regulations to the contrary — that where negotiable paper is received in payment of an antecedent debt; or where it is transferred, by indorsement, as collateral security for a debt created, or a purchase made, at the time of transfer; or the transfer is to secure a debt, not due, under an agreement express or to be clearly implied from the circumstances, that the collection of the principal debt is to be postponed or delayed until the collateral matured; or where time is agreed to be given and is actually given upon a debt overdue, in consideration of the transfer of negotiable paper as collateral security

therefor; or where the transferred note takes the place of other paper previously pledged as collateral security for a debt, either at the time such debt was contracted or before it became due, — in each of these cases the holder who takes the transferred paper, before its maturity, and without notice, actual or otherwise, of any defence thereto, is held to have received it in due course of business, and, in the sense of the commercial law, becomes a holder for value, entitled to enforce payment, without regard to any equity or defence which exists between prior parties to such paper.

Upon these propositions there seems at this day to be no substantial conflict of authority. But there is such conflict where the note is transferred as collateral security *merely*, without other circumstances, for a debt previously created. One of the grounds upon which some courts of high authority refuse, in such cases, to apply the rule announced in *Swift* v. *Tyson* is, that transactions of that kind are not in the usual and ordinary course of commercial dealings. But this objection is not sustained by the recognized usages of the commercial world, nor, as we think, by sound reason. The transfer of negotiable paper as security for antecedent debts constitutes a material and an increasing portion of the commerce of the country. Such transactions have become very common in financial circles. They have grown out of the necessities of business, and, in these days of great commercial activity, they contribute largely to the benefit and convenience both of debtors and creditors. Mr. Parsons, in his treatise on the Law of Promissory Notes and Bills of Exchange, discusses the general question of the transfer of negotiable paper under three aspects, — one, where the paper is received as collateral security for antecedent debts. We concur with the author, "that, when the principles of the law merchant have established more firmly and unreservedly their control and their protection over the instruments of the merchant, all of these transfers (not affected by peculiar circumstances) will be held to be regular, and to rest upon a valid consideration." 1 Parsons, Notes and Bills (2d ed.), 218.

Another ground upon which some courts have declined to sanction the rule announced in *Swift* v. *Tyson* is, that upon the

transfer of negotiable paper merely as collateral security for an antecedent debt nothing is surrendered by the indorsee, — that to permit the equities between prior parties to prevail deprives him of no right or advantage enjoyed at the time of transfer, imposes upon him no additional burdens, and subjects him to no additional inconveniences.

This may be true in some, but it is not true in most cases, nor, in our opinion, is it ever true when the note, upon its delivery to the transferee, is in such form as to make him a party to the instrument, and impose upon him the duties which, according to the commercial law, must be discharged by the holder of negotiable paper in order to fix liability upon the indorser.

The bank did not take the note in suit as a mere agent to receive the amount due when it suited the convenience of the debtor to make payment. It received the note under an obligation imposed by the commercial law, to present it for payment, and give notice of non-payment, in the mode prescribed by the settled rules of that law. We are of opinion that the undertaking of the bank to fix the liability of prior parties, by due presentation for payment and due notice in case of non-payment, — an undertaking necessarily implied by becoming a party to the instrument, — was a sufficient consideration to protect it against equities existing between the other parties, of which it had no notice. It assumed the duties and responsibilities of a holder for value, and should have the rights and privileges pertaining to that position. The correctness of this rule is apparent in cases like the one now before us. The note in suit was negotiable in form, and was delivered by the maker for the purpose of being negotiated. Had it been regularly discounted by the bank, at any time before maturity, and the proceeds either placed to the credit of Hutchinson & Ingersoll, or applied directly to the discharge, *pro tanto*, of any one of the call loans previously made to them, it would not be doubted that the bank would be protected against the equities of prior parties. Instead of procuring its formal discount, Hutchinson & Ingersoll used it to secure the ultimate payment of their own debt to the bank. At the time the written agreement of July 22, 1873, was executed, by which this note, with others,

was pledged as security for any debt then or thereafter held against them, the bank had the right to call in the $10,000 loan, that is, to require immediate payment. The securities upon which that loan rested had become, in part, worthless, and it is evident that but for the deposit of additional collateral securities the bank would have called in the loan, or resorted to its rightful legal remedies for the enforcement of payment. It was, under the circumstances, the duty of the debtors to make such payment, or to secure the debt. It was important to them, and was in the usual course of commercial transactions, to furnish such security. If the bank was deceived as to the real ownership of the paper, or as to the purposes of its execution and delivery to Hutchinson & Ingersoll, it was because the railroad company intrusted it to those parties in a form which indicated that the latter were its rightful holders and owners, with absolute power to dispose of it for any purpose they saw proper.

Our conclusion, therefore, is that the transfer, before maturity, of negotiable paper, as security for an antecedent debt merely, without other circumstances, if the paper be so indorsed that the holder becomes a party to the instrument, although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of such debt. In either case, the *bona fide* holder is unaffected by equities or defences between prior parties, of which he had no notice. This conclusion is abundantly sustained by authority. A different determination by this court would, we apprehend, greatly surprise both the legal profession and the commercial world. See Bigelow's Bills and Notes, 502 *et seq.*; 1 Daniel, Neg. Inst. (2d ed.) c. 25, sects. 820–833; Story, Promissory Notes, sects. 186, 195 (7th ed.), by Thorndyke; 1 Parsons, Notes and Bills (2d ed.), 218, sect. 4, c. 6; and Redfield & Bigelow's Leading Cases upon Bills of Exchange and Promissory Notes, where the authorities are cited by the authors.

It is, however, insisted that, by the course of judicial decision in New York, negotiable paper transferred merely as collateral security for an antecedent debt, is subject to the equities

of prior parties existing at the time of transfer; that the bank being located in New York, and the other parties being citizens of the same State, and the contract having been there made, this court is bound to accept and follow the decision of the State court, whether it meets our approval or not. This contention rests upon the provision of the statute which declares that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

It is undoubtedly true that if we should apply to this case the principles announced in the highest court of the State of New York, a different conclusion would have been reached from that already announced. That learned court has held that the holder of negotiable paper transferred *merely* as collateral security for an antecedent debt, nothing more, is not a holder for value, within those rules of commercial law which protect such paper against the equities of prior parties.

The question here presented is concluded by our former decisions.

We remark, at the outset, that the section of the statute of the United States already quoted is the same as the thirty-fourth section of the original Judiciary Act.

In *Swift* v. *Tyson* (*supra*), the contention was that this court was obliged to follow the decisions of the State courts in all cases where they apply. But this court said: "In order to maintain the argument, it is essential, therefore, to hold that the word 'laws' in this section includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws. In all the vari-

ous cases which have hitherto come before us for decision this court have uniformly supposed that the true interpretation of the thirty-fourth section limited its application to State laws strictly local; that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character. It has never been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation: as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the State tribunals are called upon to perform the like functions as ourselves; that is, to ascertain upon general reasoning and legal analogies what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commerial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to and will receive the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed."

In *Carpenter* v. *The Providence Washington Insurance Co.* (16 Pet. 495), decided at the same term with *Swift* v. *Tyson*, it was necessary to determine certain questions in the law of insurance. The court said: "The questions under our consideration are questions of general commercial law, and depend upon the construction of a contract of insurance which is by no means local in its character, or regulated by any local policy or customs. Whatever respect, therefore, the decisions of State

tribunals may have on such a subject, and they certainly are entitled to great respect, they cannot conclude the judgment of this court. On the contrary, we are bound to interpret this instrument according to our own opinion of its true intent and objects, aided by all the lights which can be obtained from all external sources whatsoever; and if the result to which we have arrived differs from these learned State courts, we may regret it, but it cannot be permitted to alter our judgment."

In *Oates* v. *National Bank* (100 U. S. 239), we had before us the precise question now under consideration. That was an action by a national bank, located in Alabama, against a citizen of that State, upon a promissory note there executed and negotiated. It was contended that the decision of the Supreme Court of Alabama should be accepted as the law governing the rights of parties. We, however, held — referring to some of our previous decisions — that the Federal courts were not bound by the decisions of the State courts "upon questions of general commercial law. . . . We have already seen that the statutes of Alabama placed under the protection of the commercial law promissory notes payable in money at a certain designated place; but how far the rights of parties here are affected by the rules and doctrines of that law is for the Federal courts to determine, upon their own judgment as to what these rules and doctrines are."

To this doctrine, which received the approval of all the members of this court when first announced, we have, as our decisions show, steadily adhered. We perceive no reason for its modification in any degree whatever. We could not infringe upon it, in this case, without disturbing or endangering that stability which is essential to be maintained in the rules of commercial law. The decisions of the New York court, which we are asked to follow in determining the rights of parties under a contract there made, are not in exposition of any legislative enactment of that State. They express the opinion of that court, not as to the rights of parties under any law local to that State, but as to their rights under the general commercial law existing throughout the Union, except where it may have been modified or changed by some local statute. It is a law not peculiar to one State, or dependent upon local author-

ity, but one arising out of the usages of the commercial world. Suppose a State court, in a case before it, should determine what were the laws of war as applicable to that and similar cases. The Federal courts, sitting in that State, possessing, it must be conceded, equal power with the State court in the determination of such questions, must, upon the theory of counsel for the plaintiff in error, accept the conclusions of the State court as the true interpretation, for that locality, of the laws of war, and as the "law" of the State in the sense of the statute which makes the "laws of the States rules of decision in trials at common law." We apprehend, however, that no one would go that far in asserting the binding force of State decisions upon the courts of the United States when the latter are required, in the discharge of their judicial functions, to consider questions of general law, arising in suits to which their jurisdiction extends. To so hold would be to defeat one of the objects for which those courts were established, and introduce infinite confusion in their decisions of such questions. Further elaboration would seem to be unnecessary.

Judgment affirmed.

MR. JUSTICE MILLER and MR. JUSTICE FIELD dissented.

MR. JUSTICE CLIFFORD and MR. JUSTICE BRADLEY, concurring in the judgment, delivered the following opinions: —

MR. JUSTICE CLIFFORD. Commercial law is a system of jurisprudence acknowledged by all maritime nations, and upon no subject is it of more importance that there should be, as far as practicable, uniformity of decision throughout the world.

Bills of exchange and promissory notes are commercial paper in the strictest sense, and as such must ever be regarded as favored instruments, as well on account of their negotiable quality, as their universal convenience in mercantile affairs. Everywhere the rule is that they may be transferred by indorsement, or when indorsed in blank or made payable to bearer they are transferable by mere delivery. International regulations encourage their use as a safe and convenient medium for the settlement of balances among mercantile men

of different nations, and any course of judicial decision calculated to restrain or impede their full and unembarrassed circulation for the purposes of foreign or domestic trade would be contrary to the soundest principles of public policy. *Goodman* v. *Simonds*, 20 How. 343, 364.

Sufficient appears to show that the corporation plaintiff became the holder of the note described in the declaration, and that, payment being refused, it instituted the present action of assumpsit to recover the amount. Service having been made, the defendant appeared and set up several defences, which are fully exhibited in its answer filed in the case. Certain proceedings followed, which it is not necessary to notice, as the parties by consent waived a jury and submitted the cause to the Circuit Court upon an agreed statement of facts. Hearing was had, and the Circuit Court rendered judgment in favor of the plaintiff for the amount of the note and costs of suit, and the defendant sued out the present writ of error.

Eight errors are assigned, but it will not be necessary to give the several assignments a separate examination, as the questions presented do not properly involve more than three material propositions: 1. That the cause of action is barred by a former recovery in an action by the plaintiff against the indorsers of the note. 2. That the plaintiff, inasmuch as it holds the note as collateral security for a pre-existing debt, is not a *bona fide* holder of the same within the meaning of the commercial rule which shuts out proof of equities between the antecedent parties to the instrument. 3. That by the law of the State the plaintiff, in view of the facts exhibited in the agreed statement, is not entitled to the benefit of that rule, and that the law of the State in that regard furnishes in such a case the rule of decision in the Federal courts.

Special findings were made by the Circuit Court, from which it appears that the defendant was the maker of the note, and that it was payable to the order of its treasurer, by whom it was indorsed in blank, and that it was also indorsed by the firm of Palmer & Company, consisting of the president and financial agent of the corporation defendant.

Enough appears to show that the note was made and indorsed for the sole purpose of raising money for the use of

the defendant, nothing having been paid to either of the indorsers for their indorsement. When duly executed and indorsed in blank, the defendant placed the note with others in the hands of a firm of note-brokers for sale to raise money for its use. Prior to that, the same note-brokers had frequently borrowed money from the corporation plaintiff; but they did not keep any account with the bank, and had no other transactions with the same than those set forth in the findings of the court.

Twelve call-loans at seven per cent interest were made at different times by the plaintiff to the note-brokers on collaterals, as specifically enumerated and described in the findings, each of which was separate and had no reference to any other, and it appears that each was made upon a separate lot of collaterals. Two of those loans, to wit, the one for $36,000, and the last one, which is for $10,000, will be the subject of special comment in disposing of the case.

Before the brokers applied for the loan of $36,000, it appears that they had paid all their previous loans obtained from the plaintiff, and that they procured the loan upon collaterals, among which was the note for $36,000 described in the findings. Other banks or capitalists made loans to these brokers, taking collaterals as security, and the plaintiff three weeks later loaned them $10,000 more, taking as security the four notes mentioned in the findings.

Adequate collaterals were at that time held by the plaintiff for each of those loans, but it appears that the promisors of one of the collaterals given for the last loan, within eleven days after the money was advanced, failed in business and became notoriously bankrupt, and that knowledge of that fact reached the plaintiff. Prior to that, it was known that the brokers who negotiated the loans were insolvent, and the findings show that they, at the request of the plaintiff, executed and delivered to it the instrument exhibited in the transcript, in which they agreed that all securities, bonds, stocks, or other property deposited by them with the plaintiff might be held by it, and be deemed security for all their indebtedness to the plaintiff, as more fully set forth in the findings.

Certain advances were made by the brokers to the defend-

ant, by reason of which the latter became indebted to them in the sum of $600, and it appears that the defendant tendered that sum both to the brokers and the plaintiff, and demanded the return of note in suit.

Payment in full of the large note was obtained by the plaintiff out of the collaterals originally deposited with it for that purpose, and it appears that the moneys collected from those collaterals exceeded the amount of that loan by the sum of $2,403.61, so that the entire balance remaining due on the last loan was $5,906.99.

Process to enforce payment was first sued out against the indorsers, and in that action the plaintiff recovered judgment in the sum of $600, which sum, with the costs of suit, was duly paid; and it appears that the balance due, deducting the collections from the collaterals and the judgment against the indorsers, is $5,136.68, for which, with interest and costs, the judgment was entered in the Circuit Court.

Judgments rendered in courts of competent jurisdiction are conclusive between the parties and privies until the same are reversed or in some manner set aside and annulled.

When a fact has once been tried and decided by a court of competent jurisdiction, it cannot be again contested between the same parties or their privies in the same or any other court, if it appear that the same matter was directly involved in the pleadings and that the merits of the cause were decided in the first case.

Parties and privies in such a case are bound by the estoppel, but the holder of a negotiable bill of exchange or promissory note may pursue his remedy against the indorsers as well as the immediate promissory party. Consequently, as stated by Mr. Bigelow, an indorsee of a bill of exchange or promissory note may sue all the prior parties concurrently or successively at his election, subject to the condition that he is entitled to but one satisfaction. Bigelow, Estoppel (2d ed.), 55; *Bishop* v. *Haywood*, 4 T. R. 478; *Britten* v. *Webb*, 2 Barn. & Cress. 483; *Windham* v. *Wither*, 1 Stra. 515; *Burgess* v. *Merrill*, 4 Taunt. 468; *Farwell* v. *Hilliard*, 3 N. H. 318; *Porter* v. *Ingraham*, 10 Mass. 88.

Authorities to show that the holder in such a case is not

estopped to sue the maker because he has recovered judgment against the indorser are numerous and decisive. *Russell & Erwin Manuf. Co.* v. *Carpenter*, 5 Hun (N. Y.), 162; Story, Promissory Notes (7th ed.), sect. 401; *Pritchard* v. *Hitchcock*, 6 Man. & G. 151, 201.

Suppose that is so, then it is insisted by the defendant that the plaintiff is not a *bona-fide* holder for value in the usual course of business within the meaning of the commercial law.

Questions of fact are set at rest by the findings, from which it appears that the note is payable to the treasurer of the defendant or order, by whom it was indorsed in blank as well as by the firm, consisting of the president and financial agent of the company; that it was placed by the maker in the hands of the brokers for sale to raise money for the use of the maker, and that the plaintiff loaned the full amount of the note to the agents of the defendant and took the note indorsed in blank as collateral security for the loan before maturity. None of these matters are disputed, and it is equally and undeniably true that the whole of the money loaned went into the hands of the defendant, in pursuance of the arrangement it made with its own agents.

Neither fraud nor mistake is alleged or even suggested in respect to any one of these matters, from which it follows, as a necessary legal conclusion, that the plaintiff became the actual holder of the note in good faith before maturity by delivery from the agents of the defendant, and that it as such assumed the responsibility to demand payment of the maker when the note fell due, and, if not paid, to give the required notice of non-payment to the indorsers.

Beyond all question, the findings show that the plaintiff in good faith became a party to the note described in the declaration before maturity, and that as such holder it was bound to adopt proper measures to fix the liability of the indorsers, and that if it had failed to demand payment of the maker, or to give the required notice to the indorsers, it would have become liable to the party from whom it received the note for whatever loss ensued from such neglect. Such a holder of a foreign bill of exchange, if not paid at maturity, must see that it is duly protested; and for the same reason the holder of an inland

bill or negotiable promissory note must see to it that proper steps are taken, in case of non-payment by the acceptor or maker, to fix the liability of parties to the instrument who would otherwise be discharged.

Securities of a negotiable character may be transferred by indorsement made at the time they are delivered, or if indorsed in blank or made payable to bearer, they may be transferred by mere delivery without any new indorsement. In either case, the holder, other things being equal, acquires full title to the instrument, the correct commercial rule being that whoever lawfully and in good faith becomes the holder of a valid negotiable bill of exchange or promissory note before maturity, by direct indorsement or by delivery when indorsed in blank or made payable to bearer, assumes the responsibility, if not paid when it falls due, of entering protest or of making demand and giving notice of non-payment as the case may require; and that in all cases of such a transfer the holder, whether he paid cash for the note or made new advances to the transferrer, or accepted it in substitution of prior collaterals surrendered, or received it in payment of property sold or of antecedent indebtedness, or as collateral security of a pre-existing debt or any pecuniary liability for the pledgor, is a holder for value in the usual course of business within the meaning of the commercial law, and is unaffected by any equities between the antecedent parties, provided he took it in good faith and without notice of anything to impeach the title of the person from whom it was received.

Authorities everywhere agree at the present time that a *bona fide* holder of a negotiable instrument for a valuable consideration, without notice of anything which impeaches its validity, if he takes it under an indorsement made before maturity, holds the title unaffected by any equities between the antecedent parties, even though as between them it may be without any legal validity. *Swift* v. *Tyson*, 16 Pet. 1, 15.

Instruments of the kind are commercial paper in the strictest sense, and must ever be regarded as favored securities, on account of their universal convenience in mercantile transactions and the settled rule is that transferees of the same hold the instrument clothed with the presumption that it was nego

tiated for value, in the usual course of business, at the time of its execution, and without notice of any equities between the antecedent parties to the instrument. *Collins* v. *Gilbert*, 94 U. S. 753.

Possession of such an instrument before maturity, if indorsed in blank or payable to bearer, is *prima facie* evidence that the holder is the owner and lawful possessor of the same; and nothing short of proof that he had knowledge, at the time he took it, of the facts which impeach the title as between the antecedent parties, not even gross negligence, if unattended with *mala fides*, is sufficient to overcome the effect of that evidence, or to invalidate the title of the holder supported by that presumption. *Goodman* v. *Harvey*, 4 Ad. & E. 870; *Goodman* v. *Simonds*, 20 How. 343, 365; *Bank* v. *Leighton*, 2 Exch. Rep. 61; *Wheeler* v. *Guild*, 20 Pick. (Mass.) 545, 550; *Magee* v. *Badger*, 34 N. Y. 247, 249.

Apply that rule in an action by the transferee against the maker of a negotiable note indorsed in blank, or payable to bearer, and it is clear that he has nothing to do in the opening of his case except to prove the signatures to the instrument and introduce the same in evidence, as the instrument goes to the jury clothed with the presumption that the plaintiff became the holder of the same for value at its date in the usual course of business, without notice of anything to impeach his title. *Pettee* v. *Prout*, 3 Gray (Mass.), 502; *Way* v. *Richardson*, id. 412.

Clothed as the instrument is with the described presumption, the plaintiff is not bound to give any evidence to show that he gave value for the same until the other party has clearly proved that the consideration was illegal, or that the instrument was fraudulent in its inception, or that it had been lost or stolen before it came to the possession of the holder. *Fitch* v. *Jones*, 5 El. & Bl. 238; *Smith* v. *Braine*, 16 Ad. & E. N. S. 242; *Hall* v. *Featherstone*, 3 H. & N. 282.

Cases arise where the supposed defect or the infirmity of the title appears on the face of the instrument; and where that is so, the question whether the party who took it had notice or not is in general a question of construction, and must be determined by the court as matter of law. *Andrews* v. *Pond*,

13 Pet. 65; *Fowler* v. *Brantley*, 14 id. 318; *Brown* v. *Davis*, 3 T. R. 86.

Decided cases of the highest authority support that proposition, but it is a very different matter when it is proposed to impeach the title of the holder by proof of facts and circumstances outside of the instrument itself, as he is then to be affected, if at all, by what has occurred between other parties. For his own acts he is plainly responsible, but he may well claim exemption from any consequences flowing from the acts of others, unless it be first clearly shown that he had knowledge of such facts and circumstances at the time he became the holder of the instrument. Actual knowledge of such facts and circumstances must be proved to defeat the title of the holder; and the question whether he had such knowledge or not is a question of fact for the jury, and, like other questions of *scienter*, must be submitted to their determination.

Indorsers of negotiable securities enjoyed the protection of that rule for ages before any successful attempt was made to annex to it any qualification, unless it appeared that the consideration was illegal, or that the instrument was fraudulent in its inception, or that it had been lost or stolen before it came to the possession of the holder. *Hinton's Case*, 2 Show. 235; *Anonymous*, 1 Salk. 126; *Miller* v. *Race*, 1 Burr. 452; *Grant* v. *Vaughan*, 3 id. 1516; *Peacock* v. *Rhodes*, 2 Doug. 633; *Lawson* v. *Weston*, 4 Esp. 56.

Throughout the whole period covered by those decisions it was universally understood that the title of the *bona fide* holder was unaffected by any equities between the antecedent parties; but it was subsequently decided that if the indorser of the instrument had no valid title to the same, and that such facts and circumstances were known to the indorsee, at the time of the transfer, as would have caused a person of ordinary prudence to suspect that the indorser had no right to transfer the instrument or to use the same for his own benefit, then the holder, as against the acceptor or maker, is not entitled to recover. *Gill* v. *Cubitt*, 3 Barn. & Cress. 466.

For a brief period that rule was followed, but it was never satisfactory, and at the end of twelve years was distinctly overruled in the tribunal where it was first promulgated.

Goodman v. *Harvey*, 4 Ad. & E. 870; *Arbouin* v. *Anderson*, 1 Ad. & E. N. S. 498.

We must hold, said Lord Denman, in the case last cited, that the owner of a bill of exchange is entitled to recover upon it if he has come by it honestly, and that that fact is implied *prima facie* by possession, and that, to meet the inference so raised, fraud, felony, or some such matter must be proved.

Abundant authority to support the proposition that the case which for a period relaxed that rule has been overruled for more than half a century is found in the reported cases already cited, and Mr. Chitty says that the old rule of law, that the nolder of a negotiable security transferable by delivery can give a title, which he himself does not possess, to a person taking the same *bona fide* for value, is by those decisions again re-established in its fullest extent. Chitty, Bills (13th ed.), 257; *Worcester County Bank* v. *Dorchester & Milton Bank*, 10 Cush. (Mass.) 491. Conclusive support to that conclusion is found in decisions not previously cited and in the text-writers of the highest authority. *Bank of Pittsburgh* v. *Neal*, 22 How. 96; *Murray* v. *Lardner*, 2 Wall. 110.

Nothing short of fraud, not even gross negligence, says Mr. Justice Story, if unattended with *mala fides* on the part of the taker of the instrument, will invalidate his title so as to prevent him from recovering the amount. Story, Promissory Notes (7th ed.), sect. 382. Every person, says the same learned author, is treated in the sense of the rule as a *bona fide* holder for value, not only who has advanced money or other value for it, but who has received it in payment of a precedent debt, or has a lien on it, or has taken it as collateral security for a precedent debt, or for future as well as for past advances. Story on Bills (4th ed.), sect. 192.

During the period the modified rule referred to was recognized as good law in the courts of the country where it was first promulgated, it must be admitted that the courts of several of the States in our own country accepted the same rule, and that the pernicious effects resulting from those examples are still to be seen in some of the more recent State decisions. Attempt was made at one time to maintain that the holder of a negotiable security, if he received it as *payment* of a precedent

debt, could not be regarded as a *bona fide* holder for value in the usual course of business, even though he took it without notice of any defect in the title of the transferrer, or of any equities between the antecedent parties; but that erroneous rule of decision is abandoned and overruled. *Bank of St. Albans* v. *Gilliland*, 23 Wend. (N. Y.) 311; *Small* v. *Smith*, 1 Den. (N. Y.) 583, 586; Edwards, Bills and Notes (2d ed.), 322.

Reported cases also show that it was decided during that period in the courts of the same State that if a party in good faith took a negotiable security of a holder without due inquiry, or with knowledge of such facts and circumstances as would put a prudent man upon inquiry in making purchases of personal property, he would not acquire a good title to the instrument, if it appeared that equities existed between the antecedent parties, and that vigilant inquiry would have enabled the taker to have ascertained the true character of those equities; but the appellate tribunal of the State has exploded that legal heresy as applied to negotiable securities, and has in that respect adopted the true commercial rule as administered in the courts of Westminster Hall. *Pringle* v. *Phillips*, 5 Sandf. (N. Y.) 157; *Welch* v. *Sage*, 47 N. Y. 143, 147.

Prior to the decision in the case of *Gill* v. *Cubitt*, the rule was that nothing short of proof of knowledge of the facts and circumstances constituting the equities between the antecedent parties would enable the maker to defend the suit of the holder; but the court in that case decided that the transferee could not recover if the circumstances under which the transfer took place were such as would naturally have excited the suspicion of a prudent and careful man. State court decisions in many cases followed that erroneous theory; but the case itself has been authoritatively overruled in the tribunal where it had its origin, and the old rule as re-established by the later adjudications has been in repeated instances adopted by this court and by the highest courts of the State where the present controversy arose. *Goodman* v. *Harvey*, 4 Ad. & E. 870; *Goodman* v. *Simonds*, 20 How. 343, 364; *Seybel* v. *National Currency Bank*, 54 N. Y. 288, 295; *Dutchess Insurance Co.* v. *Hachfield*, 73 id. 226.

Much progress, it will be seen from the preceding observations, has been made within the last thirty years in securing

uniformity of decision in respect to mercantile controversies between the Federal and State courts, and the courts of this country and those of the parent country, from which most of our commercial rules and usages are derived. *Howry* v. *Eppinger*, 34 Mich. 29.

Concede all that, and still it is insisted by the defendant that the plaintiff took the note merely as a collateral security for a pre-existing debt, without any present consideration at the time of the transfer, and that a party who takes a negotiable security under such circumstances cannot be regarded as acquiring it in the usual course of business, and consequently that he takes it subject to prior equities. Many decisions of the courts of the State concur that if there is a present consideration at the time of the transfer, independent of the previous indebtedness, a party acquiring a negotiable bill of exchange or promissory note before maturity as a collateral security for a pre-existing debt, without knowledge of the facts which impeach the title as between the antecedent parties, thereby becomes a holder in the usual course of business, and that his title is complete, so that it will not be affected by any prior equities between other parties, at least to the extent of the debt for which it is so held. *White* v. *Springfield Bank*, 3 Sandf. (N. Y.) 222; *New York Marbled Iron Works* v. *Smith*, 4 Duer (N. Y.), 362.

When commercial paper is pledged by the apparent owner before it matures as collateral security for advances, the pledgee in good faith is entitled to hold it for the amount of such advances, though it turns out afterwards that the party making the pledge was a mere agent for the true owner, and that the transaction was a breach of duty to the principal. *Belmont Branch Bank* v. *Hoge*, 35 N. Y. 65; *Murray* v. *Beckwith*, 81 Ill. 43.

Where full value is paid by the pledgee, and the transfer is made before maturity, without notice of any prior equities between the antecedent parties, the title of the holder of the security is not subject to be defeated by proof that he might have obtained such notice by the exercise of active vigilance. Cash advances or the sale of goods or other property will constitute a good consideration for the transfer; nor is such a pay-

ment or sale indispensable, as it is equally well settled that the actual discharge of a precedent debt, or the surrender of prior collaterals, or a binding agreement to give time for the payment of a debt then due, will have the same effect. *Elting* v. *Vanderlyn*, 4 Johns. (N. Y.) 237; *Morton* v. *Burn*, 7 Ad. & E. 19; *Jennison* v. *Stafford*, 1 Cush. (Mass.) 168; *Baker* v. *Walker*, 14 Mee. & W. 465; *Walton* v. *Mascall*, 13 id. 452; *Wheeler* v. *Slocum*, 16 Pick. (Mass.) 62; *Kearslake* v. *Morgan*, 5 T. R. 513.

Examples given by Mr. Justice Story show that the receiving a note as security for a debt, or forbearance to sue a present claim or debt, or an exchange of securities, or becoming a surety, or doing any other act at the request or for the benefit of the maker or indorser, will constitute a sufficient consideration for a note as well as the payment of money, or the making of advances, or giving credit, or the discharge of a present debt, or the performance of work or labor at the request of the party. Story, Promissory Notes (7th ed.), sect. 186.

Differences of opinion, however, still exist where the transfer is made as a collateral security for a pre-existing debt, without any other consideration than what flows from the nature of the contract at the time the instrument is delivered, and such as may be inferred from the relation of debtor and creditor in respect to the pre-existing debt.

Further argument to show that where negotiable paper is received in payment and extinguishment of a pre-existing debt the holder is entitled to protection is quite unnecessary, as the authorities in support of the proposition, even in this country, are quite too numerous for citation. *Townsley* v. *Gamrall*, 2 Pet. 170, 182; Parsons, Bills and Notes, 221.

Nor is it necessary to add anything to prove that the title of the holder is good if he took the note outright for goods or other property sold and delivered to the transferrer of the note at the time the transfer was made. All this is admitted, or if not admitted is so fully established by authority as not to require any further argument in its support. Substantial uniformity of judicial opinion exists both in this country and in England to that extent, but there is still some diversity of decision in this country upon the question whether the same

conclusion will follow where the negotiable security is transferred as collateral security, without any other consideration than the delay of payment incident to the transaction and what flows from the relation of debtor and creditor in respect to the existing debt and the obligation which the transferee assumes by the reception of the negotiable instrument before maturity. Standard decisions of the State courts are referred to by the defendant where it is held that the title of the holder under such circumstances is not good. *Bay* v. *Coddington*, 5 Johns. (N. Y.) Ch. 54, 59; *Coddington* v. *Bay*, 20 Johns. (N. Y.) 637, 644; *Stalker* v. *McDonald*, 6 Hill (N. Y.) 93, 95.

Sixty years have elapsed since the commercial rule adopted and enforced by that series of decisions was first promulgated, and yet it does not and never has commanded the slightest countenance from any court sitting in Westminster Hall. Earnest differences of opinion existed in that country among judicial men in respect to the extent of the protection which the commercial law afforded to a *bona fide* holder of a negotiable security against the equities between the antecedent parties, but there is no authentic evidence that any substantial diversity of opinion ever arose in the courts of that country touching the question under consideration.

Partners engaged in business being in want of available means, the senior member gave his note to a bank to enable the firm to overdraw their account, and the junior member gave his note to the maker of the first note for half the amount. In the course of subsequent transactions the payee of the last note indorsed it to his creditors as collateral security for a pre-existing debt. Payment of the note being refused, the holders sued the maker, who made defence that the plaintiffs were not *bona fide* holders; but the court held otherwise, and rendered judgment in favor of the plaintiffs, separate opinions being given by all the justices of the court. *Heywood* v. *Watson*, 1 M. & P. 268; s. c. 4 Bing. 496.

Consideration was given for the note in the case of *Percival* v. *Frampton* (2 C., M. & R. 180), but the court unanimously held that, if the note had been transferred merely as a collateral security for a previous debt, the plaintiffs might properly be described as holders for a valuable consideration.

Holders of a negotiable security transferred before maturity as a collateral security for a pre-existing debt become parties to the instrument to such an extent that they assume the responsibility of making demand and giving the required notice to fix the liability of the indorser; and it is held that where a creditor received such a security from the debtor and failed to make seasonable demand of payment, that his laches as between himself and his debtor were equivalent to the payment of the collateral. *Peacock* v. *Purcell*, 14 C. B. N. S. 728; *Taylor* v. *Williams*, 11 Metc. (Mass.) 44.

Proof of fraud may defeat the right of the holder in such a case, but where there is no such proof the settled rule in England is that a party taking a negotiable instrument as a collateral security takes it for a sufficient consideration and is entitled to recover. *Poirier* v. *Morris*, 22 Law J. Rep. N. S. Q. B. 313; S. C. 2 El. & Bl. 89, 104.

Securities of the kind were deposited by the defendant with the plaintiffs as collaterals for a pre-existing debt, among which was the check in controversy, and it appeared that the defendants having failed to pay the debt the plaintiffs brought an action on the check, the defence being the want of consideration and that the plaintiffs were not holders for value; but the Court of Exchequer ruled otherwise, and rendered judgment in favor of the plaintiffs, from which the defendant appealed to the Exchequer Chamber. Both parties were fully heard in the appellate tribunal, and the court decided that the title of a creditor to a negotiable security transferred to him on account of a pre-existing debt, if received *bona fide*, without notice of any infirmity in the title of the debtor, is indefeasible, whether the instrument is payable at a future time or on demand. *Currie* v. *Misa*, Law Rep. 10 Ex. 153.

Questions of various kinds, it seems, were discussed in the subordinate court; but the statement of the justice who gave the opinion of the court in the appellate tribunal is, that the argument was addressed almost entirely to the question whether an existing debt formed of itself a sufficient consideration for a negotiable security payable on demand, so as to constitute the creditor to whom it was paid a holder for value; and the court, Justice Lush giving the opinion, decided that question in the

affirmative. His reasons for the conclusion are cogent and satisfactory, and in the course of the opinion he remarked that "it was not disputed on the argument, nor could it be, that if instead of a check the security had been a bill or note, payable at a subsequent date, however short, the plaintiffs' title would have been unimpeachable;" to which he also added, that the proposition had been established by many authorities, both in that country and in the American courts.

No attempt was made to controvert that proposition as applied to bills or notes payable at a future day; but the defendant insisted that inasmuch as the check was payable on demand the rule did not apply, as there was no consideration, because it could not be implied that there was any agreement for delay. Suffice it to say in that regard that the court decided that the supposed distinction "had no foundation either in principle or upon authority," and proceeded to remark that it does not follow that the legal element of consideration is entirely absent where the security is payable immediately.

Forbearance is doubtless a good consideration for the transfer of such an instrument; but a valuable consideration in the sense of the law, as the court remarked in that case, may consist either in some right, interest, profit, or benefit accruing to the one party, or some extension of time of payment, detriment, loss, or responsibility given, suffered, or undertaken by the other.

Call-loans may be regarded as payable on demand, and, inasmuch as the collateral in this case was payable at a future day, the implication is not an unreasonable one that the arrangement operated as an injury to the holder and as a benefit to the debtor and pledgor. Such a reason may doubtless have weight; but it is by no means certain that it is the true foundation of the title of the holder, as other authorities hold that a negotiable security transferred for such a purpose is in some sense a conditional payment of the debt, the condition being that the debt revives if the security is not realized. *Belshaw* v. *Bush*, 11 C. B. 191–205; *Griffiths* v. *Owen*, 13 Mee. & W. 58, 64.

Still not satisfied, the defendant in the case (*Currie* v. *Misa*) appealed from the judgment of affirmance rendered in the

Exchequer Chamber to the House of Lords. Much instruction is derived in respect to the issue between the parties by referring to the propositions maintained by the counsel of the appellant, of which the following are the most important: 1. That there was a total failure of consideration, inasmuch as the defendant Misa never received any value for his draft except the four bills which were dishonored. 2. That the check in question was not a bill of exchange, nor a promissory note, nor an order for the payment of money on demand. 3. That the existence of a past debt is not a sufficient consideration for the transfer of the check.

Enough is reported of the arguments for the appellant to show that nothing was left undone by his counsel in their power to do to sustain those propositions; but the learned judges overruled them all, and affirmed the judgment rendered in the two lower courts. In giving the principal opinion, Lord Chelmsford said that he entertained no doubt that, as between the defendant and the depositor of the check, there was a sufficient consideration, and that the bankers were holders for value, and he proceeded to remark that the counsel of the appellant admit that if the judges are of that opinion it will dispose of the case. All the judges concurred that the holders were holders for value, and the result was the same as in the court of original jurisdiction. *Misa* v. *Currie*, 1 App. Cas. 554, 563.

Corresponding views are held in the Queen's Bench, in the Court of Appeals, and in the High Court of Chancery. Where a party by means of a false pretence, or condition which he does not fulfil, procures another party to give him a note or acceptance in favor of a third person, to whom he pays it and who receives it *bona fide* for value, the Queen's Bench decided that the giver remains liable to pay the same, because his acceptance or transfer of the same imports value *prima facie*, and he can only relieve himself from his promise to pay the holder by showing that he is not a holder for value, or that he received the instrument in bad faith, or with notice of its infirmity. *Watson* v. *Russell*, 3 B. & S. 34, 40.

Two of the justices concurred in that proposition without any qualification, and the Chief Justice also concurred in the

same to the extent of the debt of the holder it was pledged to secure, which is the same rule that Shaw, C. J., with the concurrence of all his associates, adopted nearly twenty years earlier. *Chicopee Bank* v. *Chapin*, 8 Metc. (Mass.) 40.

Commercial securities, when transferred to discharge a pre-existing debt, it is admitted, give the holder a good title which will shut out prior equities; and the Court of Appeals in a recent case decided that there was no difference in that regard between past and present consideration to be found in the books, and held that the transfer of a bill of lading for a valuable consideration to a *bona fide* transferee defeats the right of stoppage *in transitu* of the unpaid vendor of the goods, although the consideration was past and not given at the time the bill of lading was delivered to the transferee by the lawful holder. *Leask* v. *Scott*, 2 Q. B. D. 376, 380.

Certain bankers pressed their debtors for better security, and the debtors, having promised to comply with the request, hypothecated merchandise for the purpose, evidenced by warehouse certificates, which the debtors agreed to deliver as soon as they could be procured from the warehouse. They, the debtors, procured the warrants, but refused to deliver the same, when the plaintiffs instituted the present suit, to which the respondents demurred, insisting that the existence of the debt is no sufficient consideration for such an agreement. Among other things, the respondents contended that the allegations of the bill did not exhibit a transaction where the complainants promised to abstain from suing their demand for any certain time; but the Vice-Chancellor held that the bankers did in effect give, and that the respondents did receive, the benefit of some degree of forbearance and benefit that they would not have obtained if they had not made the agreement, and the demurrer was accordingly overruled. *Alliance Bank* v. *Broom & Co.*, 2 Drew. & Sm. 289.

Without more, these authorities are sufficient to show that there is but one voice upon the subject in the courts of the parent country, and that they speak to the point with a degree of unanimity and uniformity well calculated to excite admiration and to inspire confidence that the rule of decision is both correct and just. Not only every court, but every

judge of every court, in that country concurs in the proposition, that the holder of such a negotiable security before maturity, as collateral to a pre-existing debt, without notice of any prior equities, is a *bona fide* holder for value in the usual course of business, and that his title to the instrument is good, and wholly unaffected by any such prior equities between the antecedent parties. Text-writers everywhere adopt the same rule, and recognize and commend it as the correct and true rule of decision.

So, if a bill or note be indorsed as a *collateral security*, says Chitty, that is an adequate consideration to enable the party to sue thereon, though he advanced no new credit on the bill or note at the time; and he lays down the same rule as to the receipt of a bill or note in payment of a pre-existing debt. Chitty, Bills (13th ed.), 74.

In the ordinary course of things, says Mr. Justice Story, the holder is presumed to be the *prima facie* holder of such a security for value, and he is not bound to give evidence that he gave any value for it, until the other party establishes the want or failure or illegality of the consideration, or that the bill had been lost or stolen before it came to the possession of the holder. It may then be incumbent on him to show that he has given value for it, because he ought not, under such circumstances, to be placed in a better situation than the antecedent parties through whom he obtained the instrument. Story, Bills (4th ed.), sect. 193; Story, Notes (7th ed.), sects. 195, 196.

A creditor, says Byles, may agree to take a bill as collateral security for a debt already due, without affecting his present right to sue for the debt; but, if a creditor elects so to do, he becomes the trustee to that extent of the debtor, and is bound to perform the duties of a holder in respect to presentment and notice of dishonor, and, if he fail to do so, the parties only liable conditionally are discharged, as no one but the actual holder can perform those duties. Byles, Bills (5th Am. ed.), 369; *Peacock* v. *Purcell*, 32 L. J. 256; S. C. 14 C. B. N. S. 728.

Litigated cases often arise where there is a present consideration given for the transfer; and Mr. Daniel regards it as

agreed that the holder of the collateral security, in all such cases, is a *bona fide* holder for value, if he took the security without notice of any equities between the antecedent parties, or if there was any agreement, express or *implied*, to give time of payment of the debt to the debtor; but he admits that, where neither of these conditions exists in the case, the question is one of more difficulty. Those two propositions he supports by sound reasons and convincing suggestions, and then proceeds to examine the argument for and against the proposition, that the same conclusion should be reached even where there is no new consideration other than what arises from the relation of debtor and creditor, nor any express agreement to extend the time of payment. His view is, that the issue in such a case must turn upon the question whether there is any implied suspension of the prior debt until the collateral becomes due, and that an implied agreement is as binding as one expressed in terms, of which it is supposed no one entertains the least doubt.

Different examples are put by the author, and the proper presumption in each supposed case is stated; but he finally comes to the conclusion that, inasmuch as the holder in such a case becomes a party to the collateral security, and that he thereby assumes the burden as such holder of fixing the liability of the indorser, he is properly to be regarded as a holder for value, if he took the collateral in good faith and without notice of any equities between the antecedent parties. 1 Daniel, Negotiable Securities (2d ed.), sects. 827–830; *Blanchard* v. *Stevens*, 3 Cush. (Mass.) 162, 167; *Maitland* v. *Citizens' National Bank of Baltimore*, 40 Md. 540, 564.

Three of the theories involved in the controversy are presented by Mr. Parsons for careful examination: 1. Where negotiable paper is received in payment of an antecedent debt; but further discussion of that topic is unnecessary, as it is conceded in this case that the title of the holder in such a case is as good as if the contents were paid in cash. 2. Where it is received as collateral security for a pre-existing debt. 3. Where it is received as collateral security for a debt contracted at the date of the transfer.

Two objections, as the author states, are usually taken to each of the last two theories: 1. That, as no new consideration

is paid by the holder, he is not injured by the impeachment of his title. 2. That such a transfer as is supposed in either of the last two cases is not one made in the usual course of business.

Transfers of negotiable securities, for the purpose supposed, are seldom made, except in the execution of some agreement or understanding, by which the transferrer is to be benefited; as by delay or forbearance or further credit, or the giving up of other collaterals, or the substitution of one collateral for another, or the promise to forego the means of obtaining other indemnity or security.

Few cases, it is presumed, arise where the interest of the debtor is not consulted; so that, if the rule should be confined to the cases falling within the abstract theory of such a defence, the question would cease to be of much importance, nor would it often be true that, if the title of the holder should be impeached, he would be left in as good condition as he was before. 1 Parsons, Bills and Notes, 219.

Debtors are often benefited by delay, but creditors are usually sufferers. Transactions of the kind, it is said, are not to be regarded as transfers made in the usual course of business; but the court is unable to adopt that conclusion, as the statement of the learned author is believed to be correct, that a large part of the use that is made of negotiable paper is as a means of borrowing money or of securing debts previously contracted.

Bills and instruments of the kind, indorsed in blank or payable to bearer, when transferred to an innocent holder create the same liability as if indorsed at the time of the transfer. Where a party executed such a note to take up a prior note, and his agent delivered it to a third person as collateral security for his own pre-existing debt, Shaw, C. J., held that the holder took a good title as against the maker to the extent of his debt, but that he could not recover any more than the amount of his pre-existing debt. *Stoddard* v. *Kimball*, 6 Cush. (Mass.) 469.

Adjudged cases, almost without number, decide that, where the pre-existing debt is discharged, the title of the innocent holder is beyond question; but frequent attempt is made to show that there is a distinction between taking such a note in

payment of a pre-existing debt and taking it as a collateral security for such a payment. One whose debt is due, says Redfield, C. J., must pay it, or become a bankrupt in the commercial sense. If, instead of money, he gives a bill or note, either on time or at sight, whether this is payment in form or is given as collateral to his debt, he gains time, and is saved from the disgrace and ruin consequent upon stopping payment. Viewed as it may be, the debtor in either case derives the benefit of an implied understanding that the creditor will not immediately press for payment, unless the new security proves unproductive, and, if it does, that the creditor may pursue any other proper remedy. Difference in form between payment and collateral security, it was admitted, existed; but the court unanimously held that there was no difference in principle, provided the indorsement was unqualified, so as to impose upon the holder the obligation to conform to the law merchant in enforcing payment. *Atkinson* v. *Brooks*, 26 Vt. 569, 576.

Other State decisions, too numerous for citation, hold that a party taking a negotiable note in payment of, or as a collateral security for, a precedent debt, is a *bona fide* holder for a valuable consideration, and that he is entitled to the same protection as a holder who receives the same in payment for goods delivered at the time of the transfer, or one who pays cash for the instrument when it is delivered. *Allaire* v. *Hartshorne*, 21 N. J. L. 665; *Hamilton* v. *Vought*, 34 id. 187, 191; *Culver* v. *Benedict*, 13 Gray (Mass.), 7, 10; *Johnson* v. *Way*, 27 Ohio St. 374, 379; *Brush* v. *Scribner*, 11 Conn. 388; *Gwynn* v. *Lee*, 9 Gill (Md.), 138.

Even suppose that the title of the plaintiffs is good under the rule of the commercial law, as understood and administered in the Federal courts, still it is insisted by the defendants that the State courts have adopted a different rule in such a case, and that the State rule of decision is the one applicable in the case before the court. Both parties are citizens of the same State; and it must be admitted that if the State rule is applicable in the case, then the ruling of the Circuit Court is erroneous. Various arguments were advanced in support of the proposition, but the one most pressed is that derived from the thirty-fourth section of the Judiciary Act, which provides that the laws of

the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply. 1 Stat. 92.

State laws furnish rules of decision in trials at common law in the Federal courts, in cases where they apply, which leaves it plainly to be understood that those laws do not apply in all cases, and it was early decided that they do not apply to the process and practice of the Federal courts. *Wyman* v. *Southard*, 10 Wheat. 1.

In cases depending on the statutes of a State, and more especially in those representing titles to land, the court adopts the construction of the State, where that construction is settled and can be ascertained. *Polk's Lessee* v. *Wendell*, 9 Cranch, 87, 98.

Where any rule of real property has been settled in the State courts, the same rule will be applied by this court that would be applied by them. *Jackson* v. *Chew*, 12 Wheat. 153, 162.

Controversies often arise where this court will refuse to adopt a decision of the State court, as in the construction of a will, unless it appears that the decision has become, by acquiescence, a rule of property in the State. *Lane* v. *Vick*, 3 How. 464, 476.

Three decisions from the State courts show that the rule of decision adopted by the courts of the State at that period support the views of the defendants, and we regret to say that the tendency of some of the later decisions in the same tribunals are in the same direction. *Atlantic National Bank of New York* v. *Franklin*, 55 N. Y. 235.

Such being the fact, it becomes necessary to decide the question whether the decisions of a State court compel this court to apply to the facts of the case a rule of decision, believed to be in direct conflict with the rule of commercial law. Nearly forty years have elapsed since this question was first presented to this court for decision. Doubts were then entertained whether the State rule was absolutely settled; but, for the purposes of the decision, that point was unconditionally ad-

mitted Then as now the chief argument in support of the proposition was that the question was controlled by the thirty-fourth section of the Judiciary Act, to which the court responded, in the first place, by denying that the word "laws," used in the section, included the decisions of the local tribunals within the scope of its meaning. In the ordinary meaning of language, said Mr. Justice Story, it will hardly be contended that the decisions of the courts constitute laws, adding that, at most, they are only evidence of what the law is, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective or ill-founded or otherwise incorrect.

His views were that the laws of a State are more usually understood to be the rules and enactments of the legislature, or long established local customs having the force of laws. None, it is believed, can dissent from that view, and we have the authority of that opinion for saying that, in all cases prior to that time, the court had uniformly supposed that the section, when properly interpreted, was limited in its application to State laws strictly local, and the construction thereof by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character; that the court had never supposed that the section applied, or was designed to apply, to the construction of ordinary contracts or other written instruments, nor to questions of general commercial law.

These views were enforced by many other illustrations, and the court decided — every member of the court but one concurring — that the section, upon its true intendment and construction, is strictly limited to local statutes and local usages, and that it does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect of which are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. *Swift* v. *Tyson*, 16 Pet. 1, 18.

Judicial views of a corresponding character were expressed by Lord Mansfield, as Chief Justice of the King's Bench, nearly a century earlier, when he said that the maritime law is not the

law of a particular country, but the general law of nations. *Luke* v. *Lyde*, 2 Burr. 882.

Mr. Justice Story referred to that case, in support of the decision of the court, and quoted the celebrated maxim of Cicero, which, liberally interpreted, is to the effect that maritime law is not one thing in one country and another thing in a different country, nor one thing to-day and another to-morrow, but that, in all times and nations, it is immutable and imperishable. Translation by Yonge (London, 1853), 360.

Commercial law, says Bouvier, is a phrase employed to denote the branch of the law which relates to the rights of property and the relations of persons engaged in commerce. Persons engaged in commercial adventures, wherever they may have their domicile, have business relations throughout the civilized world, from which it results that commercial law is less local and more international than any other system of law, except the law of nations.

Codes, laws, and ordinances of other States, says a learned writer, whether ancient or modern, are received by the courts with great respect, not as containing any authority in themselves, but as evidence of the general law merchant. Where these are contradicted by judicial decisions, they cease to have any value in the jurisdiction where the law is decided to be the other way. Levi (2d ed.), 2.

Authoritative support to the proposition, that the decisions of the State courts do not control in such a case, is also derived from other decisions of this court, in which every member of the court concurred. *Carpenter* v. *The Providence Washington Insurance Co.*, 16 Pet. 495, 511.

Insurance against fire in that case was effected by a mortgagor, and one of the questions was as to the amount the insured was entitled to recover. Reported cases from the State reports were referred to as furnishing the rule of decision. Responsive to that argument, Mr. Justice Story remarked, among other things, that the question presented was a question of general commercial law, involving the construction of an insurance contract, which is by no means local in its character, or regulated by any local policy or customs; that the decisions of the State tribunals are entitled to great respect, but that

they cannot conclude the judgment of this court in such a case, and that this court is bound to interpret the instrument according to its own opinion of its true intent and objects.

Equally decisive views have often been expressed by this court in other cases, of which one deserves special notice. Preliminary to the point decided, the court very properly admitted that the Federal courts will pay due regard to the laws of the States and their construction by the State tribunals; but the court decided, Mr. Justice Harlan giving the opinion, that this court is not bound by the decisions of the State courts in determining a question of general commercial law; that such is the established doctrine of the court, so frequently announced as not to require any extended citation of authorities in its support. *Oates* v. *National Bank*, 100 U. S. 239; *Amis* v. *Smith*, 16 Pet. 303, 314; Conkling's Treatise (5th ed.), 140.

Argument to show that the decisions of this court referred to contradict the decisions of the State court upon the matter in decision is quite unnecessary, as that is admitted. Nor is it correct to suppose that the leading case, contradicting the views of the State court, is unsupported to its full extent by other decisions of this court. Instead of that, the doctrines of that case were directly and fully reaffirmed in the following case, decided more than twelve years later. *Watson* v. *Tarpley*, 18 How. 517.

State legislation, as shown in that case, had prescribed regulations in respect to the protest of bills of exchange, and notice of their dishonor repugnant to the requirements of the law merchant; and this court held that the State regulations were not operative, and that the payee or indorsee of the bill, in spite of the State law, might enforce his rights in the Federal court, as defined and recognized by the decisions of this court. Reference was there made to the sentiments expressed by Lord Mansfield, that the maritime law was not the law of one country only, but of the commercial world; and the court decided that the commercial law was not circumscribed within any local limits, and that citizens resorting to the Federal tribunals for the ascertainment of their rights might well claim the benefit of the rules of the general commercial law. Six of the

justices of the court, including the Chief Justice, held the same views in the still later case, to which special reference is made. *Goodman* v. *Simonds*, 20 How. 343, 371.

Collaterals, previously held in that case, had been surrendered when the new arrangement was made, and the evidence showed an agreement for forbearance; and the court, in order to prevent a dissent, rested the case, so far as respected the question of consideration, upon those special facts; but it is deemed proper to state that two-thirds of the court entirely approved of the views of Mr. Justice Story, as expressed in *Swift* v. *Tyson*, and in his valuable works upon bills of exchange and promissory notes. Confirmation of the proposition that his views in that decision are correct is also derived from a note appended to the text of the third volume of Kent's Commentaries, by the distinguished author, in which he says that he is inclined to concur in that decision as the plainer and better doctrine. 3 Kent, Com. (12th ed.) 81; Cooley, Const. Lim. (4th ed.) 18.

State decisions, in respect to titles to real estate and transfers of property, usually furnish the rule of decision in the Federal courts, by virtue of the before-mentioned provision of the Judiciary Act; but the established practice is, that it does not apply, except in matters of a strictly local character; that is to say, to the positive statutes of the States and the interpretations of the same by their own tribunals, including rights and titles to things having a permanent locality, such as real property, and that it does not extend to questions of general commercial law, from which it follows that where any controversy arises as to the liability of a party to a bill of exchange, promissory note, or other negotiable paper, in one of the Federal courts, which is not determined by the positive words of a State statute, or its meaning as construed by the State courts, the Federal courts will apply to its solution the general principles of the law merchant, regardless of any local decision. 1 Daniel, Neg. Inst. (2d ed.) sect. 10.

Transactions of a commercial character extend throughout the civilized world, and it is well known that they are chiefly conducted through the medium of bills of exchange and other negotiable instruments. Uniformity of decision is a matter of

great public convenience and universal necessity, acknowledged by all commercial nations. Should this court adopt a principle of decision which when carried into effect would establish as many different rules for the determination of commercial controversies as there are States in the Union, it would justly be considered a public calamity, as it must necessarily depreciate our negotiable securities in all the foreign markets of the world where our merchants have commercial transactions.

Stable and immutable rules are necessary to give confidence to those who receive such securities in the usual course of business, when indorsed in blank, or made payable to bearer, so that if such a bill or note is made without consideration, or be lost or stolen, and afterwards be negotiated for value to one having no knowledge of such facts, in the usual course of business, his title shall be good, and he shall be entitled to collect the amount.

Uniformity of decision in such cases is highly desirable, and these observations are sufficient to show that nothing is wanting to accomplish that great object but the concurrence of a few more of the State courts, of which none are more to be desired than the courts of New York and Pennsylvania. It is hoped that they will concur at no distant day.

For these reasons the conclusion is that the judgment should be affirmed.

MR. JUSTICE BRADLEY. I concur in the judgment rendered in this case, and in most of the reasons given in the opinion. But, in reference to the consideration of the transfer of the note as collateral security, I do not regard the obligation assumed by the indorsee (the bank), to present the note for payment and give notice of non-payment, as the only, or the principal, consideration of such transfer. The true consideration was the debt due from the indorsers to the indorsee, and the obligation to pay or secure said debt. Had any other collateral security been given, as a mortgage, or a pledge of property, it would have been equally sustained by the consideration referred to; namely, the debt and the obligation to pay it or to secure its payment. If the indorsers had assigned

a mortgage for that purpose, the title of the bank to hold the mortgage would have been indubitable. In that case prior equities of the mortgagor might have prevailed against the title of the bank; because a mortgage is not a commercial security, and its transfer for any consideration whatever does not cut off prior equities. But the *bona fide* transfer of commercial paper before maturity does cut off such equities; and every collateral is held by the creditor by such title and in such manner as appertain to its nature and qualities. Security for the payment of a debt actually owing is a good consideration, and sufficient to support a transfer of property. When such transfer is made for such purpose, it has due effect as a complete transfer, according to the nature and incidents of the property transferred. When it is a promissory note or bill of exchange, it has the effect of giving absolute title and of cutting off prior equities, provided the ordinary conditions exist to give it that effect. If not transferred before maturity or in due course of business, then, of course, it cannot have such effect. But I think it is well shown in the principal opinion that a transfer for the purpose of securing a debt is a transfer in due course. And that really ends the argument on the subject.

NATIONAL BANK v. DAYTON.

A., being indebted to B., proposed, in consideration of a further loan of money, to deliver, in payment of both sums, a certain quantity of wood at a stipulated price per cord. B. accepted the proposal, C. agreeing to receive the wood from him at that price. The loan was made, and A., pursuant to the agreement of the parties, delivered the wood upon the premises of C. *Held*, that A.'s title passed by that delivery, and that the wood was not subject to levy under executions thereafter issued by his creditors.

ERROR to the Supreme Court of Wyoming Territory.

The facts are stated in the opinion of the court.

Mr. Samuel Shellabarger and *Mr. Jeremiah S. Wilson* for the plaintiff in error.

Mr. William A. Maury for the defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This was replevin by the Wyoming National Bank against Thomas J. Dayton. The latter, as sheriff of Albany County, Wyoming Territory, had, by virtue of several attachments against the property of one W. S. Bramel, levied upon a number of cords of wood. The bank, claiming to be the owner of the wood at and before the time when the writs were issued and levied, brought this action to recover it, and damages for the detention thereof.

In the court of original jurisdiction a verdict was returned in favor of the defendant, and judgment thereon entered. From the judgment of affirmance by the Supreme Court of the Territory the present writ of error is prosecuted.

Upon the question of the ownership of the wood, at the date of the respective levies, the evidence was conflicting, and presented a case peculiarly within the province of the jury to determine, under proper guidance as to the law governing it. Without attempting to set forth the whole case, it is sufficient to remark that there was evidence to establish the following facts: —

Bramel was engaged in the business of bringing wood down the Big Laramie River to Laramie City. He had a contract with the Union Pacific Railroad Company for the delivery to it, at its yard in that city, by a specified date, of five hundred cords of wood at $5 per cord. In the necessary preparations for that engagement, he had, prior to Oct. 30, 1873, received from the bank about $2,100, which its president testified had been advanced to him at different times on this same wood. For these advances the bank held his notes. On the day last named he applied to the president of the bank for a further advance of money. His application was denied. He then proposed that the bank should *buy* all the wood he had, some of which was then in the yard of the company, but not received by it, some on the bank of the river, and some in the river. This proposition was at first declined; but, after further conversation between him and the president of the bank, it was agreed that the bank should take the five hundred cords at $5 per cord, to be paid for in the debt of $2,100, then held by the bank, and $400 in cash, upon the condition that the company

would receive the wood from the bank upon like terms. It was a part of the arrangement that Bramel should, in that event, put the wood into the yard of the company, and use the $400 for that purpose. In order to ascertain whether the company would assent to this arrangement, the bank cashier and Bramel, by direction of the president of the bank, visited Mr. Shankland, who had the control of all such business for the company. They returned together and reported that Shankland approved the arrangement, and would make out the vouchers for the wood to the bank. The cashier then paid $400 to Bramel, taking his note therefor, bearing interest at three per cent per month; and the latter went on putting the wood into the yard of the company. He had delivered at that place about three hundred and seventy-five cords, and had a few cords on the river-bank, when it was all seized by the defendant in error, under the attachments against Bramel's property. None of the wood had then been actually received by the company. Bramel's notes, to which we have referred, were held by the bank at the commencement of this action. They were taken, as the bank claimed and proved by its president, more as memoranda than anything else, and had not been surrendered to Bramel because he had not called at the bank for them.

Such was, substantially, the case of the bank. We do not say that the jury should have found that it was made out, even by a decided preponderance of the evidence, but only that there was evidence tending to show that the contract and acts of the parties were such as the foregoing statement sets forth.

Looking at the case in the light of these facts, it seems that the transaction between the bank and Bramel was something more than a mere agreement as to the disposition of the money to be obtained from the company. It constituted a sale to the bank of all the wood which he delivered at the yard of the company. The absolute title to it passed to the bank upon his depositing it there, with the intention or for the purpose of completing the sale. Nothing more remained to be done by him. His contract bound him to deliver the wood, not to the company, but at its yard only. In legal contemplation, it then came into the possession and control of the bank, and was not thereafter subject to be reached by his creditors, upon the mere

ground that the title had not passed, or that a complete delivery had not been made. The delivery in execution of the contract, at a specified place not belonging to him, was such as accorded with the nature of the property. When placed in the yard of the company, in pursuance of the agreement, the acts of the parties united with the previous verbal contract, resulting in a consummated obligatory agreement, depriving the seller of all further control of the property, and putting it under the exclusive dominion of the buyer, with a perfected title thereto.

From that moment, the indebtedness of the seller to the bank to the extent of the contract price of the wood actually delivered at the designated place was discharged, and the property was thenceforward at the risk of the buyer. Actual manual possession of the bank by its agents was, under the circumstances and regarding the nature of the property, both impracticable and unnecessary to a complete delivery. These conclusions are abundantly sustained by authority. Benjamin, Sales, bk. 1, pt. 2, p. 134; Hilliard, Sales, c. 7, pp. 124–130; Browne, Statute of Frauds, c. 15, p. 323.

The instructions were not in accordance with these views. The court failed to state distinctly and clearly the principles of law by which the jury were to be governed. Taking all the instructions together, it is evident that the deposit of the wood at the yard of the company, in pursuance of the previous agreement between the bank and Bramel that it should be put there for ultimate delivery to the company, was not regarded by the court as such a change of possession as would, in law, pass the title to the bank as against the creditors, whose attachments were subsequently issued and levied.

That we do not misinterpret the instructions is quite clear, from the opinion of the Supreme Court, which declared that "the record shows that the full and absolute control and possession of the same was publicly and privately retained by Bramel, after the alleged unconditional sale." In view of the pleadings and evidence this could not be the case, unless the court below not only disregarded the evidence in behalf of the bank, but was, further, of opinion that the delivery of the wood at the yard was insufficient to pass the title, and change the control and possession of the property from the seller to the

buyer. But that position, as we have seen, is unsound both upon principle and authority. We repeat that, if Bramel agreed to sell and the bank agreed to buy the wood at a fixed price per cord, the seller to remove the wood from the river and put it in the yard of the company, for sale or delivery to the latter by the bank, which was to receive the vouchers, and if the wood was so deposited in pursuance of that sale and agreement, then, in legal contemplation, the title and possession of the property passed to the bank from the moment it reached the yard. If after being placed there and before its receipt by the company the wood had been destroyed or stolen, the loss would have been that of the bank. It is immaterial, under the circumstances, that the company had not, when the attachments were levied, expressly or formally recognized the bank's ownership of the wood.

Some stress was laid upon the fact that the bank took the note of Bramel for the $400 advanced to him. That act, it is claimed, was inconsistent with the theory of an absolute purchase by the bank. There was, however, evidence conducing to show that the bank took the note by way only of precaution, and to meet the possible contingency of the non-delivery of the wood at the yard of the company. But it was for the jury to say what weight should be given to that fact in determining, upon the whole case, whether there was an actual sale of the wood, or only an agreement as to the disposition of the proceeds after it should be received by the company.

The judgment will be reversed, with directions to require the judgment of the court of original jurisdiction to be set aside and a new trial granted, and for such further proceedings as may be in conformity with this opinion; and it is

So ordered.

UNITED STATES v. PECK.

PECK v. UNITED STATES.

1. Parol evidence of the surrounding circumstances is admissible to show the subject-matter of a contract.
2. The conduct of one party to a contract which prevents the other from performing his part is an excuse for non-performance.

APPEALS from the Court of Claims.

Peck, the claimant, entered into a contract with the proper military officer to furnish and deliver a certain quantity of wood and hay to the military station at Tongue River, in the Yellowstone region, on or before a specified day. He furnished the wood, but failed to furnish the hay, which was furnished by other parties at an increased expense. The accounting officers of the government claimed the right to deduct from the claimant's wood account the increased cost of the hay. Whether this could lawfully be done was the principal question in the cause.

The court, upon an examination of the contract and of the surrounding circumstances of the case, were of opinion that the contracting parties, in stipulating relating to hay, contemplated hay to be cut in the Yellowstone valley, and specially at the Big Meadows near the mouth of Tongue River, — which was, indeed, the only hay which the claimant could have procured within hundreds of miles, and which it was known he relied on. The government officers, fearing that the claimant would not be able to carry out his contract, and it being absolutely necessary that the hay should be had, allowed other parties to cut the hay at Big Meadows, and therewith to supply the Tongue River station. The claimant complained of the double injury: first, of giving the hay which he relied on to other parties; and, secondly, of charging him for the increased expense of getting it. The question was whether the surrounding circumstances could be taken into consideration in the claimant's excuse, although the contract made no mention of the source from which he was to procure the hay to be supplied by him to the government.

Mr. Assistant Attorney-General Smith for the United States.
Mr. John B. Sanborn, contra.

MR. JUSTICE BRADLEY, after stating the case, delivered the opinion of the court.

We think that the facts of the case clearly bring it within the rules allowing the introduction of parol evidence: first, for the purpose of showing, by the surrounding circumstances, the subject-matter of the contract, namely, hay to be cut and gathered in the region where it was to be delivered; secondly, for the purpose of showing the conduct of the agents of the defendants by which the claimant was encouraged and led on to rely on a particular means of fulfilling his contract until it was too late to perform it in any other way; and then was prevented by these agents themselves from employing those means. The supply of hay which he depended on, and which under the circumstances he had a right to depend on, was taken away by the defendants themselves. In other words, the defendants prevented and hindered the claimant from performing his part of the contract.

That the subject-matter of a contract may be shown by parol evidence of the surrounding circumstances, see *Bradley* v. *Washington, Alexandria, & Georgetown Steam Packet Co.*, 13 Pet. 89; *Thorington* v. *Smith*, 8 Wall. 1; *Maryland* v. *Railroad Company*, 22 id. 105; *Reed* v. *Insurance Company*, 95 U. S. 23; 1 Greenl. Evid., sect. 277; Taylor, Evid., sect. 1082. And that the conduct of one party to a contract which prevents the other from performing his part is an excuse for non-performance, see Addison, Contracts, sect. 326; *Fleming* v. *Gilbert*, 3 Johns. (N. Y.) 527. In the case last cited, the defendant was sued on a bond obliging him by a certain time to procure and cancel a mortgage of the plaintiff and deliver the same to him. The defendant was allowed to prove by parol that he procured the mortgage, and, having inquired of the plaintiff what he should do with it, was directed to place it in the hands of a third person. This was held to be an excuse for not having fully performed the condition. Judge Thompson said: "It is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occa-

sioned. Had not the plaintiff dispensed with a further compliance with the condition of the bond, it is probable that the defendant would have taken measures to ascertain what steps were requisite to get the mortgage discharged of record, and would have literally complied with the condition of the bond." So when A. gave to B. a bond to convey certain premises, but they subsequently agreed by parol to rescind the contract, and A. thereupon sold the premises to a third person, it was held that though the bond was not cancelled or given up, nor any of the papers changed, yet by the parol agreement and the acts of the parties under it the bond was discharged. *Dearborn* v. *Cross*, 7 Cow. (N. Y.) 48; and see 2 Cowen & Hill's Notes to Phillips on Evid., 605. The principle involved in these cases is applicable to the present.

Judgment affirmed.

NOTE. — The other points involved in the foregoing case were of minor importance, and, at the suggestion of the justice who delivered the opinion, are omitted.

CASEY v. ADAMS.

Actions, local in their nature, may be maintained in the proper State court against a national banking association in a county or a city other than that where it is established.

ERROR to the Supreme Court of the State of Louisiana.

This was a proceeding instituted in the Fifteenth Judicial District Court, parish of La Fourche, Louisiana, by Adams & Co., against sundry parties, among whom was Nicholas W. Casey, receiver of the New Orleans Banking Association, which was organized under the act of Congress and established at New Orleans.

It appears that, by virtue of executory process issued out of that court, a certain parcel of land in the parish, whereon Adams & Co. held a mortgage, was sold, they becoming the purchasers for less than their debt. "The sheriff refused to complete the adjudication" unless they paid certain mortgage claims of the banking association and other creditors. Adams

& Co. then obtained a rule against the creditors, the sheriff and the recorder to show cause why the mortgages appearing in the names of the creditors should not be cancelled and erased, and upon the sheriff further to show cause why he should not "complete the adjudication" and put the purchasers in possession.

Casey alone appeared. He pleaded to the jurisdiction upon the ground that a national bank cannot be sued in a State court, except in the county or parish in which it is located, and that its rights cannot be determined on a rule to show cause.

The court made the rule absolute, and the Supreme Court, on appeal, affirmed the judgment. Casey thereupon removed the case here.

Mr. Charles Case, *Mr. John D. Rouse*, and *Mr. William Grant* for the plaintiff in error.

Mr. Thomas J. Durant and *Mr. Charles W. Hornor*, *contra.*

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The Federal question in this case is whether a national bank can be sued in a State court in a local action in any other county or city than that where the bank is located. By sect 5198, Rev. Stat., it is provided that "suits, actions, and proceedings against any association under this title [The National Banks] may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." This, we think, relates to transitory actions only, and not to such actions as are by law local in their character. Sect. 5136 subjects the banks to suits at law or in equity as fully as natural persons, and we see nowhere in the Banking Act any evidence of an intention on the part of Congress to exempt banks from the ordinary rules of law affecting the locality of actions founded on local things. The distinction between local and transitory actions is as old as actions themselves, and no one has ever supposed that laws which prescribed generally where one

should be sued, included such suits as were local in their character, either by statute or the common law, unless it was expressly so declared. Local actions are in the nature of suits *in rem*, and are to be prosecuted where the thing on which they are founded is situated. To give the act of Congress the construction now contended for would be in effect to declare that a national bank could not be sued at all in a local action where the thing about which the suit was brought was not in the judicial district of the United States within which the bank was located. Such a result could never have been contemplated by Congress.

The proceeding in this case was clearly local in its nature. It related to property in the parish of La Fourche, which had been seized and sold under process from the District Court of that parish. The proceeds of the sale were in that court, and could not be distributed until "a conflict of privileges" arising between creditors was settled. No personal claim was made against the bank. Nothing was wanted except to "class the privilege" of the bank on the property seized "according to its rank." Whether, under the laws of Louisiana, the form of proceeding instituted for that purpose was appropriate, is not a question for us. The decision of the Supreme Court of the State as to that matter is conclusive.

Judgment affirmed.

KIRK v. HAMILTON.

1. In 1859, M. & Co., judgment creditors of A., filed their bill in the Circuit Court of the District of Columbia, against him and others, setting forth that he had, without consideration and with intent to defraud his creditors, conveyed to the other defendants his real estate in that district. It was adjudged, May 30, 1860, that certain lots of ground be sold by a trustee to pay M. & Co. and such other creditors as might come in according to the practice of the court. The trustee subsequently reported that, having sold a part of the lots and realized more than sufficient to pay M. & Co., he had discontinued the sale. His report was confirmed Nov. 28, 1862. An order of the court, Nov. 14, 1863, recites that certain other creditors of A. had filed petitions in support of their claims, and directs that he being then a non-resident, notice of the character and object of the petitions be given him by publication. Publication was made accordingly, and the defend-

ants failing to appear, the bill was taken as confessed. The case was referred to an auditor, who reported that the claims were in excess of the proceeds of the sale remaining in the hands of the trustee. His report was confirmed. Thereupon the trustee, without any order other than that entered May 30, 1860, proceeded to sell the remainder of the lots to B. for $950. The sale was confirmed, and the cause referred to an auditor to state the accounts of the trustee and report a distribution. A. appeared before the auditor and objected to the allowance of the simple-contract debts. The report of the auditor was confirmed, and the lots were conveyed by the trustee's deed bearing date Dec. 14, 1865, to B., who entered thereon, and made improvements to the value of $4,000. A., who then resided upon a lot adjoining the premises, asserted no claim to them except as to three feet for an alley, and he afterwards admitted that even in regard to that part he was mistaken. A., Dec. 21, 1872, claiming that the trustee's sale was void and passed no title, and having obtained a deed from the party to whom he had in trust previously conveyed the lots so purchased by B., brought ejectment against the latter. *Held*, that, without affirming that the sale to B. was valid in the absence of a special direction by the court to the trustee to sell after the first order had been executed, A.'s failure to object to its validity and apply to the court to set it aside, and his not asserting any title to the premises although he had knowledge that B., claiming them under a judicial sale confirmed by a court of general jurisdiction, was expending money and making improvements thereon, constituted an equitable estoppel which precludes the maintenance of the action.

2. *Dickerson* v. *Colgrove* (100 U. S. 578) cited and approved.

ERROR to the Supreme Court of the District of Columbia.

This was an action of ejectment, brought Dec. 21, 1872, by George E. Kirk against Charles O. Hamilton and Catherine Hamilton, to recover parts of lots 7 and 9 in square 437 in the city of Washington. The defendants pleaded not guilty. A verdict was returned in their favor, and, a new trial having been refused, judgment was entered on the verdict. Kirk sued out this writ.

Six bills of exceptions were taken by Kirk. The nature and scope of the questions thereby raised will be understood from a statement of the principal facts appearing in the record of a suit in equity, commenced in the year 1859 by D. W. Moore & Co., in the Circuit Court for the District of Columbia, against him, Walter Lenox, Henry Naylor, Richard H. Clarke, A. Austin Smith, Hugh B. Sweeney, John Robinson, Major Garnett, John H. Goddard, Jr., Job W. Angus, Charles Stott, and William S. Martin, in order to obtain satisfaction of several unpaid judgments against him, amounting to less than

$200, previously rendered in favor of the complainants by justices of the peace.

The bill alleged that the complainants did not know of any property belonging to Kirk upon which execution could be levied; that he was the owner of a large amount of real estate in Washington, which he had conveyed for the purpose of hindering, delaying, and defrauding them in the recovery of their judgment debts, to wit, lot 78 in the subdivision of square No. 465, and parts of lots 7, 9, 10, 11, and 12 in square No. 437; that by deed of August, 1853, he conveyed part of lots 7 and 9 to the defendants Lenox and Naylor, in trust to secure the Washington Building Association the sum of money therein mentioned; that by deed of March 24, 1856, he conveyed a portion of the same lots to the defendants Clarke and Smith, in trust to secure the defendant Sweeney in the payment of a promissory note for $1,600; that by deed of April 14, 1854, he had conveyed parts of lots 10 and 12 in square 437 to the defendant Robinson, in trust to secure the defendant Garnett in four promissory notes of $131.25 each; that by deed of Oct. 13, 1854, he had conveyed the west half of lot 11 in square 437 to the defendant Goddard, in trust to secure the defendant Angus in the payment of a promissory note for $500; that it was provided in the deeds that if the several debts respectively mentioned therein were not paid at maturity, then the several parcels of ground thereby conveyed should be sold, and the balance remaining after satisfying the several debts to be paid to Kirk; that Kirk had purchased of one William S. Martin lots 43, 44, 45, and 46 in square 465, and for the purpose of defrauding, hindering, and delaying his trustees had caused the latter, by deed of April 22, 1858, to convey the same to him, as trustee for his wife and children; that the several pieces of property largely exceeded in value the debts secured thereby, and that if the debts were genuine and still unpaid (which was denied), then the interest of Kirk therein was liable in equity for the payment of the judgments, after satisfying any sums due on the debts described in the conveyances.

The bill further alleged that on 22d March, 1856, Kirk, for the pretended consideration of $4,000, conveyed to the defendant Stott, his heirs and assigns, lot 78 in subdivision of square

465, and parts of lots 7, 9, 10, 11, and 12 in square 437; that the deed was purely voluntary and with the intent to defraud and delay the creditors of Kirk; and, in any event, if a consideration passed, it was upon a secret trust to reconvey to Kirk whenever the sum of $4,000 was repaid.

It also alleged that the several deeds were duly recorded, and prayed that the deed from Kirk to Stott be declared null and void as against the complainants, and that the parcels of ground mentioned in the several conveyances be sold for the payment, "first, of such sums as were shown to be due on account of debts, and next, of the amount or amounts due to complainants on their judgments, and the costs" of suit.

Special interrogatories to the several defendants were embodied in the bill.

On 21st November, 1859, summons was issued, and returned 28th November, 1859, as served on all the defendants except Garnett and Martin.

At the May Term, 1860, a decree was, for want of an appearance and answer at rules, entered *pro confesso* against all of the defendants, except Garnett and Martin. It ordered that parts of lots 7 and 9 in square 437, and lot 78 in subdivision of square 465, "be sold, or so much thereof as may be necessary, for the payment of said complainants' claim and others who may come in as creditors of the said George E. Kirk by petition, in the manner and form required by law and the practice of the court, and that Edward C. Carrington be and is hereby appointed trustee to make such sale," &c.

After advertisement, as required by the decree, the trustee sold lot 78, with improvements, for $1,480. In his report of sale he says: "Your trustee, having sold sufficient property to pay and satisfy the claims provided for in said bill and decree, discontinued the sale of the other property mentioned in said proceedings."

On 28th October, 1862, the report of sale, no exception thereto having been filed, was confirmed, and the cause referred to the auditor to state the trustee's account and make distribution of the fund realized. After satisfying the claims of Moore & Co. and costs of suit, there was left a surplus in the trustee's hands of $1,008.52.

In an order entered Nov. 14, 1863, it is recited that certain creditors of Kirk had filed petitions, seeking the payment of numerous judgments and claims against him. Upon the ground that he was a non-resident living beyond the jurisdiction of the court, an order was made that notice of the character and object of the petitions be given him by publication, for six weeks, warning him to appear in person or by solicitor, on or before the second Monday of January, 1864, "at rules to be held in the clerk's office" of the court, otherwise the petitions and claims would be taken as confessed against him. Due proof of publication of that order was filed Jan. 23, 1864. On 2d February, 1864, this order was entered: "It appearing to the clerk that the defendants Geo. E. Kirk, Walter Lenox, Henry Naylor, R. H. Clarke, A. A. Smith, H. B. Sweeney, John Robinson, J. H. Goddard, Jr., Job W. Angus, and Charles Stott have failed to appear and answer in this suit, it is, this second day of February, 1864, on motion of A. Lloyd (by Fred. H. Norton), solicitor for complainants, ordered by the clerk that the bill and the matters thereof be taken for confessed against the above defendants."

By an order of the 12th of February, 1864, the cause, with the said petitions and claims, was referred to the auditor of the court, with instructions to state the trustee's account and make distribution of the balance of the fund in his hands. A report of distribution was made showing that judgments and claims were proven in excess of the funds remaining in the trustee's hands upon the sale of lot 78. His report of distribution was approved April 9, 1864.

Thereupon the trustee, Carrington, without any further order, and by virtue of the original decree of May 30, 1860, advertised, and on the 19th of April, 1864, sold at public auction, the demanded premises, being the parts of lots 7 and 9 described in the bill, to Charles O. Hamilton for $950. The sale was subsequently confirmed, and by an order of Dec. 12, 1864, the cause was referred to the auditor to state the accounts of the trustee and report a distribution. In his report the auditor says: "Pending this last reference of December, 1864, and before the case was confirmed, Kirk returned from the South, and has appeared by Mr. Laskey, his counsel, upon

this reference. The simple-contract debts are not admitted by him, but he states that he has offsets in bar against some if not all of them." Appended to the auditor's report there is the following paper: "The defendant Kirk does not admit the simple-contract debts, but contests the same, and requires the said claims before they be allowed by the auditor to be established by competent proof. R. H. Laskey, atty. for deft." The report was confirmed Feb. 5, 1865, and the purchase-money having been paid, Carrington, the trustee, by his deed of Dec. 14, 1865, conveyed the premises to Hamilton, who thereupon went into possession. The remaining facts are stated in the opinion of the court.

Mr. Albert Pike and *Mr. Luther H. Pike* for the plaintiff in error.

Mr. Richard T. Merrick and *Mr. Martin F. Morris, contra.*

MR. JUSTICE HARLAN, after stating the case, delivered the opinion of the court.

It appears from the first bill of exceptions that, upon the trial of the cause, the plaintiff, to maintain the issue joined, gave evidence to the jury tending to prove title in himself to the land in dispute, as well as his actual possession of the premises under that title; that he had fully discharged the indebtedness secured by the two deeds of trust executed, one to Lenox and Naylor, and the other to Clarke and Smith; that Charles Stott, on the 14th of May, 1872, reconveyed to him all that portion of the premises which, on the 22d of March, 1856, he had conveyed to Stott; that he had never made nor authorized any other conveyances than those just named. He also introduced a deed from Carrington, as the supposed trustee in the case of *Moore & Co.* v. *Kirk, &c.*, at the same time, however, denying its validity, and avowing that it was introduced subject to his exceptions reserved, and to be thereafter presented, as to its sufficiency in law to prove title in the defendants or either of them. It was admitted by the court subject to those exceptions. The plaintiff further gave evidence to prove that defendants were in possession of the premises at the commencement of the action, and then rested.

The bill of exceptions then shows that defendants, to sustain

their defence, and to prove title out of the plaintiff, offered to read in evidence the record of the equity suit of *Moore & Co.* v. *Kirk, &c.* Plaintiff insisted that the record of that suit was insufficient in law to maintain the issue on defendants' behalf, or to show title in them, and asked the court to inform the jury that it should not then be admitted in evidence, except subject to his exceptions as to its sufficiency in law, to be thereafter presented to the court pending the further trial of the cause. The record was so admitted. The defendants, further to maintain their defence, and to prove title in themselves, offered to introduce testimony tending to prove that, at the time of the purchase of the premises at the sale made by Carrington, trustee, in the suit of *Moore & Co.* v. *Kirk, &c.*, the only improvement thereon was a two-story four-room brick house, and that, about the year 1868, the defendants erected an extensive building on the property, at a cost of some $4,000; that when they began such building, and for some time thereafter, the plaintiff Kirk resided on the adjoining premises; that during all that time he well knew of said improvements, made no objection thereto, and asserted no claim to the property, except the west three feet thereof, adjoining his ground, and which he claimed as an alley, and, even as to such portion, he subsequently informed the witness he was mistaken; and, lastly, that the plaintiff, though residing in the city of Washington ever since about the year 1865, never, to defendants' knowledge, until the commencement of this action, asserted any claim to the prem ises in dispute.

At that stage of the trial the plaintiff interposed and asked the court to inform the jury that the testimony thus offered, in reference to defendants putting improvements on the premises, was inadmissible in law, and that such issue ought to be found for the plaintiff. The court ruled that the testimony was admissible, to which plaintiff excepted. The defendants then gave the said testimony in evidence to the jury, who rendered a verdict against the plaintiff upon the issue set forth by the first bill of exceptions.

The remaining bills of exceptions present, in different forms, the general question whether the sale by Carrington, as trustee, on the 19th of April, 1864, was or was not, upon the face of the

record of *Moore & Co.* v. *Kirk, &c.*, a mere nullity. Its validity is assailed by the plaintiff on various grounds, the most important of which seem to be: 1. That as Moore & Co. sued in their own behalf only, and not for the benefit of themselves and other creditors, the jurisdiction and power of the court was exhausted by the first sale (of lot No. 78), which raised an amount largely in excess of the claims for which Moore & Co. sued. 2. That the utmost which the court, upon the pleadings, could do, was to distribute such excess among the other creditors of Kirk who should appear, in proper form, and establish their claims. 3. That the court was entirely without jurisdiction to make a second order of sale, and did not assume to exercise any such power. 4. That the second sale by Carrington, having been made without any previous order or direction of the court, its confirmation, and the deed subsequently made to Hamilton, were absolutely null and void.

In the view we take of the case, it is unnecessary to pass upon these several objections. If it be assumed that the record of the suit of *Moore & Co.* v. *Kirk, &c.*, was, of itself, insufficient in law to divest Kirk of title to the premises in dispute, or to invest Hamilton with title, the question still remains, whether the facts disclosed by the first bill of exceptions do not constitute a defence to the present action.

After the confirmation of the sale of April 19, 1864, before any deed had been made, and while the cause was upon reference for a statement, as well of the trustee's accounts as for distribution of the fund realized by the sales, Kirk, it seems, appeared before the auditor, by an attorney, and made objection to the allowance of the simple-contract debts which had been proven against him in his absence. So far as the record discloses, no other objection to the proceedings was interposed by him. Undoubtedly he then knew, he must be conclusively presumed to have known, after he appeared before the auditor, all that had taken place in that suit during his absence from the District, including the sale of the premises in dispute, which took place only a few months prior to his appearance before the auditor. If that sale was a nullity, the court, upon application by Kirk, after his appearance before the auditor, could have disregarded all that had been done subsequently to the

first sale, discharged Hamilton's bond, returned the money he had paid, and, in addition, placed Kirk in the actual possession of the property. No such application was made. No such claim was asserted. No effort was made by him to prevent the execution of a deed to the purchaser at the second sale. So far as the record shows, he seemed to have acquiesced in what had been done in his absence. In 1868, three years after his return to the city, and two years after Hamilton had secured a deed in pursuance of his purchase, he became aware that Hamilton was in actual possession of the premises, claiming and improving them as his property. He personally knew of Hamilton's expenditures of money in their improvement, and remained silent as to any claim of his own. Indeed, his assertion while the improvements were being made, of claim to only three feet of ground next to the adjoining lot upon which he resided, was, in effect, a disclaimer that he had, or would assert, a claim to the remainder of the lots 7 and 9 which Hamilton had purchased at the sale in April, 1864. And his subsequent declaration that he was in error in claiming even that three feet of ground only added force to his former disclaimer of title in the premises. Hamilton was in possession under an apparent title acquired, as we must assume from the record, in entire good faith, by what he supposed to be a valid judicial sale, under the sanction of a court of general jurisdiction.

The only serious question upon this branch of the case is whether, consistently with the authorities, the defence is available to Hamilton in this action of ejectment to recover the possession of the property. We are of opinion that the present case comes within the reasons upon which rest the established exceptions to the general rule that title to land cannot be extinguished or transferred by acts *in pais* or by oral declarations. "What I induce my neighbor to regard as true is the truth as between us, if he has been misled by my asseveration," became a settled rule of property at a very early period in courts of equity. The same principle is thus stated by Chancellor Kent in *Wendell* v. *Van Rensselaer*, 1 Johns. (N. Y.) Ch. 344: "There is no principle better established, in this court, nor one founded on more solid considerations of equity and public utility, than that which declares, that if one man, know-

ingly, though he does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his own claim, shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel." p. 354.

While this doctrine originated in courts of equity, it has been applied in cases arising in courts of law.

In *The King* v. *The Inhabitants of Butterton* (6 Durnf. & E. 554), Mr. Justice Lawrence said: "I remember a case some years ago in which Lord Mansfield would not suffer a man to recover, even in ejectment, where he had stood by and seen the defendant build on his land."

In 2 Smith, Lead. Cas., pp. 730–740 (7th Am. ed., with notes by Hare and Wallace), the authorities are carefully examined. It is there said that there has been an increasing disposition to apply the doctrine of equitable estoppel in courts of law.

Again (pp. 733, 734): "The question presented in these and other cases, which involve the operation of equitable estoppels on real estate, is both difficult and important. It is undoubtedly true that the title to land cannot be bound by an oral agreement, or passed by matter *in pais*, without an apparent violation of those provisions of the Statute of Frauds which require a writing when the realty is involved. But it is equally well settled that equity will not allow the statute to be used as a means of effecting the fraud which it was designed to prevent, and will withdraw every case not within its spirit from the rigor of its letter, if it be possible to do so without violating the general policy of the act, and giving rise to the uncertainty which it was meant to obviate. It is well established that an estate in land may be virtually transferred from one man to another without a writing, by a verbal sale accompanied by actual possession, or by the failure of the owner to give notice of his title to the purchaser under circumstances where the omission operates as a fraud; and although the title does not pass under these circumstances, a conveyance will be decreed by a court of equity. It would, therefore, seem too late to contend that the title to real estate cannot be passed by matter *in pais*, without disregarding the Statute of Frauds; and

the only room for dispute is as to the forum in which relief must be sought. The remedy in such cases lay originally in an application to chancery, and no redress could be had [except] in a merely legal tribunal, except under rare and exceptional circumstances. But the common law has been enlarged and enriched under the principles and maxims of equity, which are constantly applied at the present day in this country, and even in England, for the relief of grantees, the protection of mortgagors, and the benefit of purchasers, by a wise adaptation of ancient forms to the more liberal spirit of modern times. The doctrine of equitable estoppel is, as its name indicates, chiefly, if not wholly, derived from courts of equity, and as these courts apply it to any species of property, there would seem no reason why its application should be restricted in courts of law. Protection against fraud is equally necessary, whatever may be the nature of the interest at stake; and there is nothing in the nature of real estate to exclude those wise and salutary principles, which are now adopted without scruple in both jurisdictions, in the case of personalty. And whatever may be the wisdom of the change, through which the law has encroached on the jurisdiction of chancery, it has now gone too far to be confined within any limits short of the whole field of jurisprudence. This view is maintained by the main current of decisions."

This question in a different form was examined in *Dickerson* v. *Colgrove*, 100 U. S. 578. That was an action of ejectment, and the defence, based upon equitable estoppel, was adjudged to be sufficient. We there held that the action involved both the right of possession and the right of property, and that as the facts developed showed that the plaintiff was not in equity and conscience entitled to disturb the possession of the defendants, there was no reason why the latter might not, under the circumstances disclosed, rely upon the doctrine of equitable estoppel to protect their possession.

Applying these principles to the case in hand, it is clear, upon the facts recited in the first bill of exceptions, and which the jury found to have been established, that the plaintiff is estopped from disturbing the possession of the defendants. He knew, as we have seen, that the defendants claimed the property

under a sale made in an equity suit to which he was an original party. The sale may have been a nullity, and it may be that he could have repudiated it as a valid transfer of his right of property. Instead of pursuing that course, he, with a knowledge of all the facts, appeared before the auditor and disputed the right of certain creditors to be paid out of the fund which had been raised by the sale of his property. He forbore to raise any question whatever as to the validity of the sale, and by his conduct indicated his purpose not to make any issue in reference to the proceedings in the equity suit. Knowing that the defendants' claim to the premises rested upon that sale, he remained silent while the latter expended large sums in their improvement, and, in effect, disclaimed title in himself. He was silent when good faith required him to put the purchaser on guard. He should not now be heard to say that that is not true which his conduct unmistakably declared was true and upon the faith of which others acted.

The evidence upon this point was properly admitted, and operated to defeat the action independently of the question whether the sale by Carrington, the trustee, and its confirmation by the court, was, itself, a valid, binding transfer of the title to the purchaser.

What has been said renders it unnecessary to consider the questions of law presented in the remaining bills of exceptions.

Judgment affirmed.

GAY v. ALTER.

By the law of Louisiana, a party to a synallagmatic contract has no right to rescind it by reason of the failure of performance by the other party, unless he returns to the latter what was received from him, so as to put him in the same situation in which he was before.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The controversy in this case related to the validity of certain judgments, and depended mainly upon the facts disclosed by the evidence. In one case the judgment creditor had agreed to accept $8,000 for a judgment of $11,000, and received $3,000

in cash on this agreement, and informally assigned the judgment to a friend of the judgment debtor for his benefit. The subsequent payments not being made as agreed, the judgment was assigned to Gay, who had notice of the transaction, and he sought to recover the whole amount. Alter, the purchaser of the property affected by the judgment, contended that it could only stand for the reduced amount, subject to the payment of $3,000, which would leave only $5,000 due. Gay claimed that, as the payments agreed to be made were not all made, the agreement was forfeited. The court below decreed in favor of Alter. Gay thereupon appealed here.

Mr. H. J. Leovy for the appellant.
Mr. George L. Bright, contra.

MR. JUSTICE BRADLEY, after stating the case, delivered the opinion of the court.

It is contended by the appellant that the contract whereby Ames agreed to sell his judgment for $8,000, was a synallagmatic contract, which he had a right to rescind if the agreement of the other party as to the payment of the purchase-money was not performed. This is undoubtedly the law of Louisiana; but that law also requires that, if a party to a contract wishes to rescind it for such a cause, he must return to the other party what he has received, so as to put him in the same situation he was in before. In the present case, it is not to be supposed that it was Ames's duty to return the $3,000 which he received, because it was really received from Aymar, the debtor. But he was at least bound to credit that amount on the judgment, which would have been a substantial return; and in that case he would have a right to maintain his judgment for the whole balance, and Gay, his vendee, would have had the same right. But he did not do this: nor has Gay done it; but, on the contrary, the latter has endeavored to collect the whole judgment without any deduction whatever. This conduct is totally inconsistent with the position taken. It shows, not a rescission of the contract, and a return or credit of the amount paid thereon, but a determination to regard the transaction as altogether void and the whole judgment still due.

We think that this position cannot be maintained.

Decree affirmed.

MENASHA *v.* HAZARD.

1. A town in Wisconsin, being thereunto authorized by law, subscribed for stock in a railroad company, and issued its bonds in payment therefor, each reciting that it "shall be valid only when it is thereon duly certified that the conditions upon which it was voted, issued, and deposited by said town have been performed." Suit was brought on the bonds by a party who in good faith purchased them before they matured. *Held*, that the certificate on the bonds (*infra*, p. 87) is in proper form, estopping the town from denying their validity, and placing them in a condition to be put on the market as commercial paper.
2. Where, before the subscription and bonds were voted, the company was authorized to consolidate with other companies constructing connecting lines, and such consolidation was effected, — *Held*, that the issue of the bonds to the consolidated company was lawful.
3. *County of Scotland* v. *Thomas* (94 U. S. 682) and *Wilson* v. *Salamanca* (99 id. 499) approved.

ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

This was an action by Rowland G. Hazard against the town of Menasha and the city of Menasha, upon interest coupons detached from bonds of the town of Menasha, payable to the Wisconsin Central Railroad Company or bearer. On the trial of the issues it appeared:

I. That the Portage, Winnebago, and Superior Railroad Company made to said town the following proposition: —

"The Portage, Winnebago, and Superior Railroad Company of the State of Wisconsin, a corporation of said State authorized to construct and operate a railroad with one or more tracks, from Doty's Island, situated in the towns of Neenah and Menasha, in the county of Winnebago, northwesterly, *via* the towns of Weyauwega, Waupaca, Amherst, and Stevens Point, to Bayfield, and thence to Superior on Lake Superior, and requiring the aid of the said towns of Menasha and Neenah, each in the sum of $50,000, in the construction of that portion of road which lies between said Doty's Island and the Wolf River, and being thereto authorized by chapter 126 of the General Laws of 1869, entitled 'An Act to authorize certain counties, towns, cities, and villages to aid in the construction of the land-grant railroad from Portage City and from Doty's Island to Lake Superior,' submits to the said town of Menasha the following proposition, to wit: —

"*First*, That in consideration of the construction by said company of a single-track railroad from block 8 in Jones's Plat in the said town of Neenah, Doty's Island, to Wolf River, and of five hundred full paid shares of the capital stock of said company of $100 each, the said town of Menasha shall pay to said company or its assigns the sum of $50,000, at the time and in the manner hereinafter provided.

"*Second*, That said town of Menasha shall secure to this company the payment of the said sum of $50,000 in its corporate bonds to be issued in that amount, to run twenty years from the date of issue, with interest thereon at the rate of seven per cent, payable semi-annually, principal and interest payable in gold at the National Bank of Commerce of the city of New York; that the said bonds, besides the usual conditions, shall provide that the same and the coupons or interest warrants thereon shall, when due, be receivable for taxes to be collected in said town; and that there shall be annually levied upon the property in said town a tax sufficient to pay the interest upon said bonds, and to raise a sinking fund to pay the principal thereof when the same shall become due, and payable in the manner provided by said chapter 126 of the General Laws of 1869; and shall also further provide that said bonds shall be valid only when it is thereon duly certified that the conditions upon which they were voted, issued, and deposited by said town have been performed. The said bonds and coupon or interest warrants attached shall be engraved or printed in the usual form and style, and in such denominations (not less than one nor more than ten hundred dollars) as shall be approved by this company, and the cost thereof shall be paid by the treasurer, on the order of the chairman of said town.

"*Third*, That the proper officers of said town shall issue said bonds as required by law, and on notice being received by the chairman of the board of supervisors of said town from the said National Bank of Commerce of New York that this company has deposited therein to the credit of said town the said five hundred full paid shares of its capital stock, he shall deposit, or cause to be deposited, in said bank all of the said bonds, with instructions to said bank or its officers to hold the same on deposit in trust for said town, until such time as there shall be filed in said bank a properly authenticated certificate signed by the chief officer of this company and the chairman of the board of supervisors of said town, or the secretary of state of this State, that the iron has been laid upon the track of road, and cars have been run over the same

through from the depot on Doty's Island, or in said town, to Wolf River, when the said bonds shall become the absolute property of and be held by said bank, subject to the order of this company or its assigns, and which certificate shall authorize and require the president of said bank to certify upon the back of each of said bonds that the conditions upon which the said bonds were voted, issued, and deposited by said town have been performed; and in case this company fail to comply with the said conditions the said bonds shall be returned to said town on demand of the authorities thereof.

"*Fourth*, That, in consideration of the acceptance of this proposition and the fulfilment of the terms thereof by the said town, this company will, without unnecessary delay, issue for deposit to the credit of said town in the said National Bank of Commerce of New York five hundred full paid shares (of $100 each) of its capital stock, which is to be delivered to said town at the time of the delivery of said bonds to this company, and that on the acceptance of this proposition, and as soon as the right of way and depot grounds have been secured by this company, this company will commence the construction of the track of said portion of its road, and will have the same completed and the iron laid thereon and cars run over the same within one year from the time the bonds of said town have been issued and deposited in said bank as aforesaid: *Provided, however*, that the like propositions submitted by this company to the town of Neenah shall be accepted and its conditions fulfilled by said town.

"*Fifth*, In the event the said town of Neenah fail to accept and fulfil the terms of said proposition so as aforesaid, submitted to it, this company further proposes to said town of Menasha that if the required additional sum of $50,000 shall be furnished to this company by individual subscription to stock in like amount, and satisfactorily secured to be paid, the depot of this company shall be located and its road constructed therefrom at such place in said town and on such route as may be agreed upon between this company and the authorities of said town, and under the foregoing proposition as hereby qualified.

"In witness whereof, the Portage, Winnebago, and Superior Railroad Company has caused these presents to be signed by its president and sealed with its seal this tenth day of May, A.D. 1870.

"GEO. REED,
"*President P., W., & S. R. R. Co.*"

II. That on the 4th of June, 1870, an election was held in said town as provided in said act, and a majority of the votes cast in favor of the railroad proposition.

III. That said proposition was published and voted upon as required by said act, except the third paragraph, which was published in the words following: —

"*Third*, That the proper officers of said town shall issue said bonds as required by law, and, on notice being received by the chairman of the board of supervisors of said town from the said National Bank of Commerce of New York that this company has deposited therein to the credit of said town the said five hundred full paid shares of its capital stock, he shall deposit, or cause to be deposited, in said bank all of the said bonds, with instructions to said bank or its officers to hold the same on deposit in trust for said town until such time as there shall be filed in said bank a properly authenticated certificate signed by the chief officers of this company and the board of supervisors of said town, or the secretary of state of this State, that the iron has been laid upon the track of road and cars have been run over the same through from the depot, on Doty's Island, or in said town, to the Wolf River, when the said bonds shall become the absolute property of and be held by said bank, subject to the order of this company or its assigns, and which certificate shall authorize and require the president of said bank to certify upon the back of each of said bonds that the conditions upon which the said bonds were voted; issued, and deposited by said town have been performed; and in case this company fail to comply with the said conditions, the said bonds shall be returned to said town on demand of the authorities thereof."

IV. That the Wisconsin Central Railroad Company deposited with said bank for said town five hundred shares of its common capital stock.

V. That on or about the 1st of June, 1871, the chairman of the board of supervisors of said town, with the town clerk, made fifty coupon bonds of said town; that thereupon a suit was instituted in the Circuit Court of the county of Winnebago by one Lawson, a tax-payer in said town, on behalf of himself and all other tax-payers, to enjoin the issue of said bonds. An injunction was allowed, and served upon the officers of said town, restraining the issue of said particular fifty bonds, but no others under said act; which injunction is still

in force. Upon service of such injunction, such issue of bonds was burned.

VI. That on the twenty-fifth day of October, 1871, said chairman and said clerk executed and delivered to the National Bank of Commerce a series of fifty coupon bonds of said town, of which the following is a copy: —

"$1,000.]	TOWN OF MENASHA.	[$1,000.
"No. 16.]	STATE OF WISCONSIN.	[No. 16.

"The town of Menasha, in the county of Winnebago and State of Wisconsin, acknowledges itself indebted in the sum of $1,000 lawful coin of the United States of America, which sum the said town of Menasha promises to pay to the Wisconsin Central Railroad Company, or to the bearer hereof, at the National Bank of Commerce in the city of New York, in twenty years from the first day of June, 1871, with interest at the rate of seven per centum, payable semi-annually at said bank, upon the presentation and delivery of the several coupons hereto annexed as they respectively become due, the principal and interest payable in gold, and to the payment of which, in the manner aforesaid, the faith and revenues of said town are hereby irrevocably pledged.

"This bond and the coupons or interest warrants thereon shall, when due, be receivable for taxes to be collected in said town, and there shall be annually levied upon the property in said town a tax sufficient to pay the interest upon this bond and to raise a sinking fund to pay the principal when the same shall become due and payable in the manner provided by chapter 126 of the General Laws of 1869 of said State, and this bond shall be valid only when it is thereon duly certified that it has been duly certified that the conditions upon which it was voted, issued, and deposited by said town have been performed.

"This bond is one of a series amounting in the aggregate to $50,000, and is issued in pursuance of a vote of the legal voters of said town on the fourth day of June, 1870, under and by virtue of an act of the legislature of the State of Wisconsin, entitled 'An Act to authorize certain counties, towns, cities, and villages to aid in the construction of the land-grant railroad from Portage City and from Doty's Island to Lake Superior,' approved March 9, 1869, and in pursuance of an act of the legislature of said State, approved Feb. 4, A.D. 1871, entitled 'An Act to change the name of the Portage, Winnebago, and Superior Rail-

road Company,' and of an act of the same legislature, approved March 1, A.D. 1871, amendatory of said chapter 126 of the General Laws of 1869 of Wisconsin.

"In witness whereof, the chairman of the board of supervisors and town clerk of said town have hereunto set their hands, this first day of June, 1871.

"F. SCHNELLEN,
"*Chairman of the Board of Supervisors.*

"Attest:

{TOWN OF MENASHA, WISCONSIN, WINNEBAGO COUNTY, SEAL.}

"D. J. RYAN, *Clerk.*"

To which bonds interest coupons in form like those sued on were annexed.

VII. That afterwards the chairman of the board of supervisors of said town and the president of the Wisconsin Central Railroad Company signed and delivered to said bank a joint certificate, which was afterwards authenticated by notarial certificates, of which the following is a copy: —

"*To the President of the National Bank of Commerce of New York:*

"The undersigned, Gardner Colby, president of the Wisconsin Central Railroad Company, formerly the Portage, Winnebago, and Superior Railroad, and Fr. Schnellen, chairman of the board of supervisors of the town of Menasha, Winnebago County, Wisconsin, do hereby certify that the iron has been laid on the track of road of said company from block No. 3 in Jones's plat, in the town of Neenah, Doty Island, to Wolf River, and that the cars have been run over the same daily for more than two weeks past from the depot on Doty's Island to said Wolf River, and that therefore, according to the terms of the proposition (a copy of which is hereto annexed), the said company are entitled to the transfer of the bonds of said town deposited with you.

"Dated at Menasha, Oct. 25, 1871.

"WISCONSIN CENTRAL R. R. Co.,
"By GARDNER COLBY, *President.*

[SEAL.] "FREDERICK SCHNELLEN,
"*Chairman of the Town of Menasha.*

"STATE OF WISCONSIN,
"*County of Waupaca, Town of Weyauwega, ss:*

"I, Albert V. Balch, a commissioner of deeds for the State of New York, residing in the town of Weyauwega aforesaid, do hereby

certify that Frederick Schnellen is the chairman of the board of supervisors of the town of Menasha, in the State of Wisconsin, and that his signature to the foregoing certificate is in his own hand and is genuine, as he has this day before me acknowledged.

"In testimony whereof, I have signed my name and affixed my official seal this twenty-fourth day of February, A.D. 1872.

[SEAL.] "ALBERT V. BALCH,

"*Commissioner of Deeds for the State of New York.*

"COMMONWEALTH OF MASSACHUSETTS,

"*County of Suffolk, City of Boston, ss:*

"On this twenty-ninth day of February, A.D. 1872, the above-named Gardner Colby, who is personally known to me to be the president of the said railroad company, made oath that the above-written certificate by him signed is true, and that the seal affixed thereto is the seal of said company and was so affixed by its authority.

"Witness my hand and official seal, at the city of Boston, the day and year aforesaid.

[SEAL.] "SAM'L S. CURTIS, *Notary Public.*"

VIII. That on the fifteenth day of March, 1872, the said bank sent said certificate of stock to the chairman of the board of supervisors of said town, and on the same day delivered said bonds to said Wisconsin Central Railroad Company.

IX. That on the seventeenth day of April, 1872, the president of the said bank affixed to said bonds his certificate, in the words following: —

"*To the President of the National Bank of Commerce of New York:*

"The undersigned, Gardner Colby, president of the Wisconsin Central Railroad Company, formerly the Portage, Winnebago, and Superior Railroad, and Fr. Schnellen, chairman of the board of supervisors of the town of Menasha, Winnebago County, Wisconsin, do hereby certify that the iron has been laid on the track of road of said company from block No. 3, in Jones's plat, in the town of Neenah, Doty's Island, to Wolf River, and that the cars have been run over the same daily for more than two weeks past from the depot on Doty's Island to said Wolf River. And that therefore, according to the terms of the proposition (a copy of which is hereto

annexed), the said company are entitled to the transfer of the bonds of said town deposited with you.

"Dated at Menasha, Oct. 25, 1871.

[SEAL.] "WISCONSIN CENTRAL R. R. Co.,

"By GARDNER COLBY, *President.*

(Signed) "FREDERICK SCHNELLEN,

"*Chairman of the Town of Menasha.*

"STATE OF WISCONSIN,

"*County of Waupaca, Town of Weyauwega, ss:*

"I, Albert V. Balch, a commissioner of deeds for the State of New York, residing in the town of Weyauwega aforesaid, do hereby certify that Frederick Schnellen is the chairman of the board of supervisors of the town of Menasha, in the State of Wisconsin, and that his signature to the foregoing certificate is in his own hand and is genuine, as he has this day before me acknowledged.

"In testimony whereof, I have signed my name and affixed my official seal this twenty-fourth day of February, A.D. 1872.

[SEAL.] "ALBERT V. BALCH,

"*Commissioner of Deeds for the State of New York.*

"COMMONWEALTH OF MASSACHUSETTS,

"*County of Suffolk, City of Boston, ss:*

"On this twenty-ninth day of February, A.D. 1872, the above-named Gardner Colby, who is personally known to me, and known to me to be the president of the said railroad company, made oath that the above-written certificate by him signed is true, and that the seal affixed thereto is the seal of said company, and was so affixed by its authority.

"Witness my hand and official seal, at the city of Boston, the day and year aforesaid.

[SEAL.] "SAM'L S. CURTIS, *Notary Public.*

"I hereby certify that I have received certificates of which the above are copies, which certificates are on file in this bank.

"April 17, 1872.

"ROBERT LENNOX KENNEDY,

"*President of the National Bank of Commerce in New York.*"

X. That in November, 1872, the said town levied a tax to pay the interest upon said bonds, and collected about two-thirds of it, and paid it over to the company, when the further collection of said tax was enjoined in the suit of said Lawson.

XI. That Lake Butte des Morts, a narrow lake about two thousand feet wide, lies between said block 3 in Jones's plat and the Wolf River, across which the route of said Wisconsin Central Railroad runs; that said company, instead of constructing a bridge of its own for its road across said lake, made an agreement with the Chicago and Northwestern Railway Company to cross said lake upon that company's bridge, of which agreement the following is a copy: —

"This agreement, made and entered into this first day of May, A.D. 1871, by and between the Chicago and Northwestern Railway Company, party of the first part, and the Wisconsin Central Railroad Company, party of the second part, witnesseth:

"The party of the first part, for and in consideration of the covenants and agreements herein contained on the part of the party of the second part, doth hereby covenant and agree to and with the said party of the second part, that the said party of the second part, its successors and assigns, shall and may have the use of and right to operate for railroad purposes, in common with the said party of the first part, the bridge across Lake Butte des Morts, near Doty's Island, in Wisconsin, and the right of way and use of ties across its land on the north side of said lake for a sufficient distance to enable said second party to make its connections therewith; also, the right of way and use of its ties from the south end of the bridge, including the bridge across the river to its depot grounds at Neenah Station, in Wisconsin, subject, however, to the regulations and stipulations hereinafter contained.

"The said party of the second part, in consideration of the premises, hereby covenants and agrees to lay down and maintain a track, with the necessary switches and frogs, at its own expense and for its own use, from the point of intersection of its own right of way with that of the party of the first part through the whole line which it may use in common with the said party of the first part, and to pay to the said party of the first part monthly, at the end of each and every month during the continuance of this agreement, one-half of the expense of maintaining and keeping in repair the line so used in common as aforesaid (including the bridges, roadbed, and ties, as well as the expense of the necessary signal-men, except, however, the iron, which each of said parties shall furnish and maintain for its own use), a statement of which expenses of maintaining said line, other than maintenance of the rails, shall be

furnished to said second party by said party of the first part monthly, at the end of each and every month during the continuance hereof.

"It is further mutually covenanted and agreed by and between the parties hereto that the payment of said one-half of the aforesaid expenses by said party of the second part shall be taken and accepted by the said first party in lieu of and as rental for the use of the line aforesaid and in full satisfaction thereof, and that said line, for the distance aforesaid, shall be used in common by the said parties, and that a signal shall be erected and maintained at joint expense, and no train of either company shall come upon the said common track until a signal for that purpose has been given; and that working trains of either company shall give way to all other trains, and freight trains to passenger trains; but if trains of both companies of the same class shall come at the same time, the train of the party of the first part shall have preference, and the management, repairs, and maintenance of said common track and line shall be and remain in charge of said first party.

"It is further mutually agreed that this agreement shall continue and remain in force for the period of twenty years hereafter next ensuing, but either party shall have the right to terminate the same upon giving to the party one year's notice in writing of its intention to terminate the same, but such notice shall not be given earlier than the first day of July, 1876.

"In witness whereof, the said party of the first part has caused these presents to be subscribed by its president or vice-president, attested by its secretary or assistant secretary, and the said party of the second part has caused these presents to be subscribed by its president and secretary, the day and year first above written.

{C. & N. W. R'Y CO. SEAL.} "CHICAGO AND NORTHWESTERN RAILWAY CO.,
"By M. L. SYKES, Jr., *Vice-President.*

"Attest:
"A. L. PRITCHARD, *Secretary.*

{WIS. CENT. R. R. CO. SEAL.} "WISCONSIN CENTRAL RAILROAD CO.,
"By GEO. REED, *President.*

"Attest:
"CURTIS REED, *Secretary.*"

XII. That said Wisconsin Central Railroad Company, in running across said bridge and coming to said block 3, runs on the line of the Chicago and Northwestern Railway Company about one mile; that except that distance the said Wisconsin

Central Railroad Company has constructed its road from said block 3 to the Wolf River.

XIII. That on Nov. 23, 1870, the said Portage, Winnebago, and Superior Railroad Company voluntarily consolidated its franchise and capital stock with the Portage, Stevens Point, and Superior Railroad Company, a corporation incorporated by and under chapter 369 of the Laws of Wisconsin, 1870, under an agreement of consolidation filed in the office of the secretary of state of the State of Wisconsin, Dec. 5, 1870.

XIV. That on Feb. 4, 1871, the name of the Portage, Winnebago, and Superior Railroad Company was changed to the Wisconsin Central Railroad Company, under the provisions of chapter 27 of Private and Local Laws of Wisconsin, 1871. That by chapter 31, General Laws of Wisconsin, 1871, approved March 1, 1871, the said chapter 126 of the General Laws of 1869 was amended as follows: —

"SECT. 2. All bonds and other securities which have heretofore been voted by any county, town, incorporated city, or village under the provisions of said chapter 126 of the General Laws of 1869 to said railroad, under its name of Portage, Winnebago, and Superior Railroad Company, shall be issued and delivered to said company by and under its said name of Wisconsin Central Railroad Company; and such bonds or other securities so issued and delivered shall have in all courts and places and with all parties the same force and effect as though the name of said company had not been changed and the same had been issued and delivered to it under its name of Portage, Winnebago, and Superior Railroad Company."

XV. That on July 1, 1871, the said company voluntarily consolidated its franchises and capital stock with the Manitowoc and Minnesota Railroad Company, a corporation incorporated and extended under and by virtue of chapter 342 of the Private and Local Laws of Wisconsin for 1868, chapters 255 and 302 of the Private and Local Laws for 1869, and chapter 476 of the Private and Local Laws for the year 1871, by an agreement thereto filed in the office of the secretary of state of the State of Wisconsin, July 10, 1871.

XVI. That by chapter 127 of the General Laws of Wisconsin for 1874 the city of Menasha was incorporated and made

capable of being sued for the indebtedness of said town of Menasha, and liable to pay three-fourths of any recovery.

XVII. That the plaintiff bought the bonds of which the coupons are in suit from Gardner Colby, president of the Wisconsin Central Railroad Company, for a valuable consideration, without notice, other than appears on the face of the bonds and certificates printed on them, as follows: Bond No. 16, on Dec. 11, 1873; bonds Nos. 12, 13, 14, 15, 18, 19, 37, 38, and 39, on Sept. 12, 1874.

The judges were divided in opinion upon the following questions: —

First, Whether the coupons executed and delivered, and there being upon the bonds to which they were annexed such certificates as hereinbefore set forth and produced upon the trial by the plaintiff, created a liability against said town in favor of the plaintiff under the pleadings and proofs.

Second, Whether the court should have instructed the jury that the construction of such railroad by the Wisconsin Central Railroad Company without constructing the same across Lake Butte des Morts, but securing the right to cross said lake on the bridge of the Chicago and Northwestern Railway Company under the contract above set forth, was not a performance of the conditions of the proposition to construct a railroad from block 3, in Jones's plat, on Doty's Island, to Wolf River.

The court submitted to the jury these two questions: —

First, As to the fact, bearing upon the certificate which the text of the bond required, whether, under all the facts presented, there has been a substantial compliance with the terms of the proposition in the terms of the bond.

Second, Whether there has been a substantial compliance on the part of the railroad company as to the conditions of the construction of the road between Doty's Island and Wolf Creek.

And as to the latter question instructed the jury as follows:

Now, if there is nothing on the bond to render it invalid, the only other question that can arise in the case is, whether the consideration for which this bond was given has failed so as to render it inoperative in the hands of the plaintiff. That leads to the other part of the consideration; viz., was the road con-

structed from block 3 of Jones's plat, in the town of Neenah, on Doty's Island, to the Wolf River. That had to be done, undoubtedly, before these bonds were to be valid, — before there was a sufficient consideration to render them available to the plaintiff in the view that we have taken of the other part of the case.

Third, Whether a delivery of the stock of the Wisconsin Central Railroad Company, after consolidation with the Portage, Winnebago, and Superior Railroad Company and with the Manitowoc and Minnesota Railroad Company, as hereinbefore set forth, was a compliance with the terms of such proposition.

Fourth, Whether said town was authorized to issue its bonds to the Wisconsin Central Railroad Company after the several consolidations hereinbefore set forth.

Judgment was rendered in favor of the plaintiff against the town for the amount of the coupons sued on, and interest and costs. The town then removed the case to this court

Mr. E. Mariner for the plaintiff in error.

Mr. Edwin H. Abbot, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The first question certified in this case is answered in the affirmative.

We think that the certificate on the back of the bonds is a substantial compliance with the condition on their face, and the proposition of the railroad company accepted by the town. The condition as expressed in the bonds is in the exact language of the second article of the proposition, and implies that they shall be considered as fully executed, and that they may be put on the market as valid commercial paper, "when it is thereon duly certified that the conditions upon which they were voted, issued, and deposited by said town have been performed." To ascertain what "duly" means in this connection it is necessary to look to the other parts of the proposition, and there we find in article 3 that the bonds, when issued by the proper officers of the town, were to be deposited with the National Bank of Commerce in New York, "in trust for said town, until such time as there shall be filed in said bank a properly authenticated certificate, signed by the chief officer of this

company and the chairman of the board of supervisors of said town, or the secretary of state of this State, that the iron has been laid upon the track of road and cars run over the same, through from the depot on Doty's Island, or in said town to Wolf River, when the said bonds shall become the absolute property of and be held by said bank, subject to the order of this company, or its assigns, and which certificate shall authorize and require the president of said bank to certify upon the back of each of said bonds that the conditions upon which the said bonds were voted, issued, and deposited by said town have been performed." Taken as a whole, the proposition and the condition on the face of the bond mean that the bonds should become the valid and subsisting obligations of the town when the president of the National Bank of Commerce had certified thereon that the president of the railroad company and the chairman of the board of supervisors of the town had certified to him that the iron had been laid on the track of the road and the cars run over the same from the depot on Doty's Island, or in said town, to Wolf River. This certificate was on the bonds when they were bought by the defendant in error on the market. In legal effect it was the same as if it contained the words, "that the conditions upon which they [the bonds] were voted, issued, and deposited by said town had been performed;" because by the very terms of the proposition the certificate of the proper officers was to be conclusive evidence to the president of the bank of that fact, and not only authorize, but require, him to make the indorsement contemplated. When, therefore, he certified that he had received, and put on file in his bank, certificates from the proper parties, such as were required as the basis of his action, he did certify to the facts which the proposition said they should conclusively prove. His statement of what they proved was unimportant. The proposition settled that.

The fact that the certificate furnished the bank is signed in the name of the railroad company by the president is not a valid objection. It was signed by the president, and that is all the proposition required.

The third and fourth questions are also answered in the affirmative.

Before the subscription and bonds were voted, the Portage, Winnebago, and Superior Company was authorized to consolidate with other companies "which by law may be authorized to construct connecting lines of road or make such consolidation." Act approved March 10, and published April 6, 1870. The Portage, Stevens Point, and Superior Railroad was incorporated March 16, 1870, with express authority to consolidate with the Portage, Winnebago, and Superior Company. The Wisconsin Central Railroad Company is, in fact, the name of Portage, Winnebago, and Superior Company as changed by statute, Feb. 4, 1871. The organization of the company was the same after as before this change. The Manitowoc and Minnesota Railroad Company was authorized to enter into consolidation agreements by the act of March 24, 1871, being chapter 476 of Private and Local Laws, Wis., 1871, and the consolidation with the company was actually effected July 1, 1871. The vote for the bonds was taken June 4, 1870, and the bonds were issued and delivered to the bank Oct. 25, 1871. Upon this state of facts we think this case is brought directly within the principles settled in *County of Scotland* v. *Thomas* (94 U. S. 682) and *Wilson* v. *Salamanca*, 99 id. 499. The authority of the Wisconsin Central Company was to consolidate with any other company that might at any time have the power to enter into such an arrangement. It was not confined to such companies as then had the power.

These answers dispose of the case, and make it unnecessary to consider the second question certified. When the bonds were "duly certified" and delivered to the railroad company by the bank, they became, under the agreement of the parties, valid instruments, completely executed in form, and in a condition to be put on the market as commercial paper. Having on them the necessary certificate, the purchaser need not inquire whether the facts were as certified. *Anthony* v. *County of Jasper*, 101 U. S. 693. With the certificate indorsed, the bonds were in legal effect the same as if they had been issued by the proper officers under full authority without the condition which appeared on their face. Under these circumstances, the condition did not destroy their negotiability.

Judgment affirmed.

PARKS v. BOOTH.

1. Reissued letters-patent No. 1826, granted Nov. 29, 1864, to Jonathan L. Booth for a new and useful improvement in grain-separators, are valid.
2. A specification describing an invention consisting merely of a new combination of old elements or devices which produces a new and useful result is sufficient if they be specifically named, their mode of operation given, and the result pointed out, so that those skilled in the art, and the public, may know the extent and nature of the claim and what the parts are which co-operate to do the work claimed for the invention.
3. Where in a suit for the infringement of letters-patent for such a combination, the parts of which are not susceptible of division or separate use, the answer sets up that the complainant is not the first and original inventor of it, the defence to be available must apply to the combination as an entirety, and not to a part of it, or to one or more of the claims of the letters, if they do not cover the entire invention.
4. A patentee is not entitled to reimbursement for counsel fees paid or expenses incurred by him, other than his taxable costs, nor to interest on the profits realized by an infringer.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

This was a suit by Jonathan L. Booth, against George Parks, Grant B. Turner, William A. Taylor, and James Vaughan, partners, under the name and style of Turner, Parks, & Co., for an alleged infringement of the complainant's reissued letters-patent, for an improvement in grain-separators.

The letters were a second reissue. The original letters, No. 25,484, were granted to Booth Sept. 20, 1859; reissued Sept. 25, 1860, No. 1043; and again reissued Nov. 29, 1864, No. 1826.

The court rendered a decree May 9, 1874, adjudging that the letters were valid, that the defendants had infringed them, and that the complainant recover the profits, gains, and advantages which the defendants received, or which accrued to them since Nov. 29, 1864, by the manufacture, use, and sale of the improvements described and secured by the reissued letters, and also such damages, if any, in addition to profits as he sustained by reason of said infringement. The case was referred to a Master to ascertain the damages and profits, who filed his report Nov. 24, 1875, awarding to the complainant, on account of profits, $9,944.09; and as damages, being expenses of con-

ducting the suit, $627.20; and compensation for the complainant's time, $420; making in all, $10,991.29.

To this report the complainant and defendants filed exceptions, which were overruled, saving that made to the allowance for his time. The Master's report, as thus amended, was confirmed Dec. 15, 1876, and a final decree rendered against the defendants for the sum of $11,184.42, being the amount found due by the amended report, with interest thereon.

From that decree the defendants appealed.

The remaining facts are stated in the opinion of the court.

Mr. William Bakewell and *Mr. T. B. Kerr* for the appellants.

Mr. W. F. Cogswell, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Power to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries is expressly vested in Congress by the Constitution. Pursuant to the power there conferred, the enactment of Congress provides that the original jurisdiction of patent cases shall be exclusive in the circuit courts or the district courts exercising circuit court powers. Rev. Stat., sects. 629–711.

Provision is also made that a party, whose rights, secured by valid patent are invaded by infringement, may seek his remedy in an action at law or by a suit in equity, at his election. 5 Stat. 124; 16 id. 206; Rev. Stat., sect. 4920.

Federal courts vested with jurisdiction in such cases have power, in their discretion, to grant injunctions to prevent the violation of any right secured by a patent, as in other cases of equity cognizance.

Sufficient appears to show that a patent in due form was issued to the complainant, on the 20th of September, 1859, for a new and useful improvement in grain-separators, which consisted in the employment and use of a series of inclined screens and boxes, having a proper shake-motion communicated to them, in connection with a fan air-blast spout, the whole being arranged in a manner set forth in the specification.

Without entering much into details, it will suffice to say in

this connection that the object of the improvement was to subject grain to a thorough screening operation. Machines were constructed under the patent and were put in operation at various places, but on the 25th of September of the next year it was surrendered and reissued, and on the 29th of November, four years later, it was surrendered a second time, when the patent in suit was issued to the complainant, which is a second reissue. Having removed the defects in the prior patents, the complainant alleges that he immediately put the machines on sale; that he has ever since been in possession of the right secured by the patent; and that he would have made large profits from the manufacture and sale of the same had he not been prevented from so doing by the respondents.

Two claims are made by the complainant. He charges that the respondents have largely infringed his exclusive right, and are still engaged in making and selling machines which are constructed in the same manner as the patented improvement, and accomplish the same object by the same mode of operation.

Service was made, and the respondents appeared and filed an answer. Their principal defences are as follows: 1. That the complainant is not the original and first inventor of the patented improvement. 2. That the alleged invention had been in public use and on sale for more than two years prior to the application by the complainant for a patent. 3. That the reissued patent described in the bill of complaint is not for the same invention as the original.

Proofs were taken, hearing had, and the Circuit Court entered a decree in favor of the complainant, and sent the cause to a master to compute the profits, gains, and advantages which the respondents have received, or which have arisen or accrued to them from the infringements of the said patent. Due report was made by the Master, to whose report certain exceptions were filed by the respondents. Exceptions were also filed by the complainant, but, inasmuch as he did not appeal, they will not be re-examined. Those filed by the respondents, which are still the subject of complaint, will receive due consideration.

Both parties appeared, and were heard in support of their respective exceptions, all of which were overruled by the Circuit Court except the fourth exception filed by the respondents.

Matters of the kind being settled, the Circuit Court entered a final decree in favor of the complainant in the sum of $11,184 42, with costs of suit. Prompt appeal was taken by the respondents to this court, and since the cause was entered here they have filed the assignment of errors set forth in their brief.

All such matters as are deemed material to the several defences pleaded in the answers will be carefully considered, without entering into the details of the argumentative portion of the errors assigned. When reduced to specific propositions, the errors assigned may be stated as follows: 1. That the complainant is not the original and first inventor of the patented improvement. 2. That the supposed improvement was not the proper subject of a patent, because it did not involve any invention. 3. That the Circuit Court erred in finding that the respondents had infringed the reissued patent of the complainant. 4. That the Circuit Court erred in overruling the exceptions of the respondents to the Master's report. 5. That the Circuit Court erred in allowing damages to the complainant in addition to profits.

Redress for the infringement of a patent may be sought by a suit in equity as well as by an action at law, and the required allegations and proofs are substantially the same in one form of remedy as in the other. Neither damages nor profits can be recovered unless the complaining party alleges and proves that he or the person under whom he claims was the original and first inventor of the patented improvement, and that the same has been infringed by the party against whom the suit is brought. Both of those allegations must be proved to maintain the suit; but the patent, if introduced in evidence by the complaining party, affords him *prima facie* evidence that the patentee was the original and first inventor. That presumption, in the absence of any satisfactory proof to the contrary, is sufficient to entitle him to recover if he proves the alleged infringement.

Evidence to overcome that presumption may be introduced by the defending party in case due notice of such an intention is given to the party that instituted the suit, as required by the act of Congress. Rev. Stat., sect. 4920. Notices of the kind

were given by the respondents in their answers, and the assignment of errors calls in question the decision of the Circuit Court in that regard, which is the first question presented for re-examination in the record.

Questions of the kind cannot well be decided without first ascertaining what the patented improvement is that is described in the first pleading of the complaining party; and that becomes necessary in this case, both in determining the issue of prior invention and the issue of infringement. Attempt having failed to show that the reissued patent is not for the same invention as the original, the question as to the nature of the improvement may be determined by the examination of the specification and drawings of the patent in suit.

Two claims are annexed to the specification. The first is the combination of the zigzag screens and boxes, as exhibited in the model and drawings, when the same have a lateral shake-motion, or one at right angles to the passage of the grain, in such a manner as to cause the grain to pass consecutively over and through them, and when arranged relatively to each other, to operate as set forth in the specification; the second is the series of zigzag screens and boxes with or without the troughs and having the lateral shake-motion in connection with the fan and spout, as set forth in the specification and exhibited in the drawings.

Plain as these claims are, it would not be difficult to define their meaning, even without resort to the details of what precedes in the specification. Speaking directly to the point, the patentee states that his invention consists in the employment or use of zigzag screens and boxes or passages having a proper lateral shake-motion communicated to them, and so arranged that the grain may pass consecutively over and through them and be subjected to a thorough screening operation. Also using in connection with the zigzag screens and boxes a revolving fan and spout, so arranged that the grain will be subjected to a sufficient blast for the separation from it of all light impurities. Reference is then made to the drawings, which show the frame of the machine and the manner in which the series of devices called inclined screens are secured by elastic pendants, as more fully explained in another part of the specification. Explana-

tions follow which show that the screens may be formed of perforated zinc or other sheet-metal, placed alternately in reversed inclined positions, as is clearly seen in figure 2 of the drawings, each screen being placed at the top of what is termed a shallow box which forms the passage of the grain, the boxes extending the whole length of the screens in order to receive the grain and discharge the same on to the elevated end of the screen next below, through openings constructed for the purpose, in order that the screening operation may be continued through the whole series of screens.

Instructive and minute explanations are given in the specification of the entire construction and mode of operation of the apparatus and the several devices of which it is composed. Beyond all doubt, the explanations constitute a full compliance with requirements of the Patent Act in all respects, and are amply sufficient to show that the invention consists of the combination of elements or ingredients, the substance of which is embodied in the claims of the patent annexed to the specification. None of the elements or ingredients are claimed to be new, from which it follows that the invention consists entirely in the combination, and not a doubt is entertained that it is both new and useful.

Inventors of machines are required, before they secure a patent, to deliver a written description of the improvement, and of the manner and process of making, constructing, and using the same, in such full, clear, and exact terms as to enable one skilled in the art or science to make, construct, and use the invention. Drawings are also required in certain cases, and if the invention is such that it may be represented by a model, the applicant for a patent is required to furnish a model of the improvement. Requirements of the kind, in cases where they apply, may be regarded as conditions precedent to the right of the commissioner to grant such an application; but cases often arise where they or some of them do not apply.

An applicant for a patent, "in case of a machine," is required to explain the principle thereof, the best mode of applying the same, and to point out and distinctly claim the part, improvement, or combination which he claims as his invention; and the respondents contend that the patent of the complainant

is invalid because the specification does not comply with that requirement. Rev. Stat., sect. 4888.

Inventions sometimes embrace an entire machine, and in such cases it is sufficient if it appears that the claim is co-extensive with the patented improvement. Other inventions embrace only one or more parts of a machine, and in such cases the part or parts claimed must be specified and pointed out, so that constructors, other inventors, and the public may know what the invention is and what is withdrawn from general use.

Patented inventions are also made which embrace both a new device or element and a new combination of old devices embodied in the same apparatus or machine. Particular description of the improvement is required in such a case, as the property of the patentee consists not only in the new device, but also in the new combination.

Modern inventions very often consist merely of a new combination of old elements or devices, where nothing is or can be claimed except the new combination. Such a combination is sufficiently described, to constitute a compliance with the letter and spirit of the act of Congress, if the devices of which it is composed are specifically named, their mode of operation given, and the new and useful result to be accomplished is pointed out, so that those skilled in the art and the public may know the extent and nature of the claim and what the parts are which co-operate to do the work claimed for the invention.

Apply those rules to the specification in question, and it is clear that the proposition that it does not point out what is claimed as new is wholly unsupported and founded in mistake as to what is required by the Patent Act.

Suppose that is so, still it is insisted by the respondents that the patentee is not the original and first inventor of the improvement. Such a defence may be supported by proof that the invention was made by another before the patented improvement was made for the infringement of which the suit is brought. Authority is also given to the respondent in such a suit to show if he can that the improvement had been patented or described in some printed publication prior to the supposed

invention set forth in the specification. Rev. Stat., sect. 4920. Defences of the kind are authorized by the act of Congress, and it may be remarked that it is not necessary to allege or prove, in order to sustain such a defence, that the prior patent or description was issued or given two years earlier, as the only requirement is that the patent or publication was prior to the supposed invention of the complainant.

Enough appears in this explanation to show that the two defences may be considered together, as it is settled law that if the patentee is not the original and first inventor of the improvement, or if it had been patented or described in any printed publication prior to the supposed invention, then the complainant cannot recover.

Notice in due form is given by the respondents in their answer and amended answer of twelve patents or specifications prior in date to the patent of the complainant, and which, as the respondents allege, supersede the invention described in the complainant's patent. Attempt will not be made to describe the invention set forth in each of these publications. Suffice it to say in that regard that all of them have been carefully examined to the extent of the means furnished by the transcript, and the court is of the opinion that no one of the documents is of a character to sustain the issue that the complainant is not the original and first inventor of the improvement.

Most or all of the inventions described in those publications bear more or less resemblance to that claimed by the complainant, and it may be that if it were allowable to test the validity of the invention in question by comparing the same with the whole as if embodied in a single exhibit, the evidence might be sufficient to support the views of the respondents in respect to the defence under consideration. Were that allowable it might well be suggested that the screen is found in one, the box in another, and the means to produce the lateral shake in a third, and so on to the end; but it would still be true that neither the same combination in its entirety nor the same mode of operation is described in any one of the patents or printed publications given in evidence.

Attempt is scarcely made in argument to show that any one

of these exhibits embodies the entire invention of the complainant, but it is insisted that every feature of the patented improvement is found in some one or more of those publications. Suppose that is so, still it is clear that such a concession, if made, could not benefit the respondents, unless they can be allowed to extend the same comparison to two or more exhibits, as they do not contend that the entire invention is superseded by any one of their exhibits.

Where the thing patented is an entirety, consisting of a separate device or of a single combination of old elements incapable of division or separate use, the respondent cannot make good the defence in question by proving that a part of the entire invention is found in one prior patent, printed publication, or machine, and another part in another, and so on indefinitely, and from the whole or any given number expect the court to determine the issue of novelty adversely to the complainant. *Bates* v. *Coe*, 98 U. S. 31.

Common justice forbids such a defence, as it would work a virtual repeal of so much of the Patent Act as gives to inventors the right to a patent consisting of old elements, where the combination itself is new and produces a new and useful result. New elements in such a patent are not required, and if such a defence were allowed, not one patent of the kind in a thousand of modern date could be held valid. Nor is such a defence consistent with the regulations enacted by Congress in respect to the procedure in litigations in respect to patent-rights.

Infringers or persons sued as such may plead the general issue, and having given the required notice may prove that the patentee is not the original and first inventor of the improvement, or that it had been patented or described in some printed publication prior to the supposed invention, or that it had been in public use or on sale in this country for more than two years before the patentee applied for his patent. Corresponding proceedings may be had in equity, the denial of infringement and notice being alleged and given in the answer.

Defences of the kind, if the thing patented is an entirety, incapable of division or of separate use, must be addressed to the invention and not to a part of it or to one or more claims

of the patent, if less than the entire invention. More than one patent may be included in one suit, and more than one invention may be secured in the same patent, in which cases the several defences may be made to each patent in the suit and to each invention to which the charge of infringement relates.

Remarks already made, without more, are sufficient to show that the evidence introduced by the respondents to sustain the proposition that the complainant is not the original and first inventor of the improvement fails to establish that assignment of error, and that the defence must be overruled.

Much discussion of the next defence is not required, beyond what is necessary to state the true construction and meaning of the provision of the Patent Act which allows that defence.

Evidence of the want of novelty arises from the acts of others, the defence being that the invention was constructed by another before the patentee made his invention, the rule being that priority of right depends in the first place upon priority of construction. Inventors may, if they can, keep their inventions secret; but if they do not, and suffer the same to go into public use for a period exceeding what is allowed by the Patent Act, they forfeit their right to a patent. Hence the Patent Act allows the infringer to plead and prove that the invention of the patentee had been in public use or on sale in this country for more than two years before the inventor applied for a patent. No question of priority is open under that defence, nor will evidence sustain it that another had made or patented the invention two years before the application, without the knowledge of the patentee whose invention is in question.

Evidence of priority is admissible under the preceding defence. Unless inventors keep their inventions secret they are required to be vigilant in securing patents for their protection; and if they do not, and suffer the same to be in public use or on sale in this country for more than two years before they apply for a patent, they forfeit their right, and if an infringer alleges and proves that defence he cannot be held liable in a suit for infringement.

Subject to this explanation, it is clear that there is no proof in this case that the complainant was guilty of any laches in

applying for a patent, or that his improvement ever went into public use or was on sale in this country before he applied for his patent.

Machines called grain-separators, it is admitted in argument, are manufactured and sold by the respondents, but they denied in their original answer that their separators were in all respects constructed in the same manner as the apparatus of the complainant, nor have they since entirely abandoned that proposition. Instead of that, they still insist that the reissued patent of the complainant differs from the original, but they substantially admit that the machines which they construct and sell do infringe the invention of the complainant, as described in the reissued patent, which is sufficient for the complainant, as the respondents have failed to make good their defence that the reissued patent is not for the same invention as the original. Irrespective of any admission, however, the court is satisfied, from a comparison of the two exhibits, that the charge of infringement is fully sustained.

Eighteen exceptions were filed by the respondents to the report of the Master, but it is not deemed necessary, in view of the state of the record, to give them a separate examination in this case. Infringement being proved, the complainant was entitled to an account of the profits made by the respondents in the unlawful use of the patented improvement, which consisted of the new combination described in the specification. Obviously it was a proper case for reference to a master, and it is not perceived that the general basis of his report exhibits any error to the prejudice of either party. Two special errors are discovered in addition to the one very properly corrected by the Circuit Court.

Costs were properly allowed, but the court is of the opinion that the complainant was not entitled to an allowance for any expenses beyond the taxable costs. Interest on the profits decreed to the complainant should not have been allowed, as was decided by this court many years ago, the better opinion being that profits in such a case are to be regarded in the light of unliquidated damages, which usually do not draw interest without the special order of the court. *Silsby* v. *Foote*, 20 How. 378, 386.

Expenses to the amount of $627.20, including counsel fees, were allowed to the complainant beyond the taxable costs, which, together with the entire interest allowed, must be deducted from the decree. From which it follows that the decree in favor of the complainant, instead of being $11,184.42, should be $9,992.09, without interest, but with costs of suit, as allowed in the decree of the Circuit Court; and the decree is modified so as to conform to that computation, but without any injunction, as the term of the patent has expired.

The decree, as modified, will be affirmed, without interest or costs, the costs of this court to be paid by the appellee; and it is

So ordered.

BROOKS v. RAILROAD COMPANY.

A petition for a rehearing cannot be filed after the term at which the judgment was rendered.

MOTION for leave to file a petition for rehearing.

This case was, on appeal from the Circuit Court of the United States for the District of Iowa, determined at the last term. It is reported in 101 U. S. 448.

Mr. Joseph E. McDonald and *Mr. John M. Butler* in support of the motion.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

A petition for rehearing after judgment, under the rule promulgated in *Public Schools* v. *Walker* (9 Wall. 603), cannot be filed except at the term in which the judgment was rendered. In *Hudson & Smith* v. *Guestier* (7 Cranch, 1), a motion was made at the February Term, 1812, for a rehearing in a case decided two years before; but the court said "the case could not be reheard after the term in which it was decided." At the end of the term, the parties are discharged from further attendance on all causes decided, and we have no power to bring them back. After that, we can do no more than correct

any clerical errors that may be found in the record of what we have done.

In *Brown* v. *Aspden* (14 How. 25), where the practice in respect to orders for reargruments was first formally announced, the rule in this particular was not extended, for Mr. Chief Justice Taney was careful to say that the order for reargument might be made after judgment, *provided* it was entered at the same term; and the same limitation is maintained in *United States* v. *Knight's Administrator*, 1 Black, 488. Down to that time such an order could be made only on the application of some member of the court who concurred in the judgment, and this continued until *Public Schools* v. *Walker* (*supra*), when leave was given counsel to submit a petition to the same effect. In all other respects the rule is now substantially the same as it was before this relaxation.

Motion denied.

GIDDINGS *v.* INSURANCE COMPANY.

The charter of A., a mutual life insurance company, provides that "every person who shall become a member of the corporation, by effecting insurance therein, shall, the first time he effects insurance and before he receives his policy, pay the rates that shall be fixed upon and determined by the trustees." In August, 1872, C., A.'s agent, received from B. an application for a policy upon his life for $6,000, duly made out upon a printed form furnished previously by C. A policy was issued by A., August 24, and forwarded to C. It contains a proviso that it shall "not take effect and become binding on the company until the premium be actually paid, during the lifetime of the person whose life is assured, to the company or to some person authorized to receive it, who shall countersign the policy on receipt of the premium." The premium to be paid by B. amounted to $302.52. The policy not having been called for, C. returned it, October 2, to A., and it was thereupon cancelled. Nothing beyond the delivery of the application to C. was done by B., or by any one in his behalf. He died September 4. His administrator tendered the first premium to C., who declined to act in the matter. Thereupon he transmitted the proofs of B.'s death to A., and on the refusal of the latter to accept the premium and deliver the policy brought this suit against A. *Held*, that the suit cannot be maintained, the payment of the premium in the lifetime of B. being a condition precedent to A.'s liability.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

This is a suit in equity by Loren Giddings and Leander Giddings, administrators of Silas Giddings, deceased, to compel the specific performance, by the Northwestern Mutual Life Insurance Company, of its alleged contract, made with him some months prior to his death, to insure his life in the sum of $6,000. The court below dismissed the bill, whereupon the complainants appealed here.

The remaining facts are stated in the opinion of the court.

Mr. Henry G. Miller and *Mr. Thomas G. Frost* for the appellants.

Mr. Thomas Hoyne, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The facts of this case necessary to be considered are few and simple. They are clearly disclosed in the record, and there is no conflict between the parties about them.

The appellee is a corporation created by the State of Wisconsin. Its principal office and place of business were at Milwaukee. It was authorized to insure lives. Dean & Payne were its agents at Chicago. The extent of their authority was to receive applications, forward them to the office at Milwaukee, and, when risks were taken, to receive, countersign, and deliver the policies, collecting in all cases, before the latter was done, the first premium from the assured.

On or about the 6th of August, 1872, a member of the firm of Roberts & Hubbard, of the county of Warren, in the State of Illinois, at the instance of Silas Giddings, Sen., of the same county, presented to Dean & Payne, at Chicago, an application, in due form, for a life insurance policy, insuring Giddings in the sum of $6,000. The application consisted of a printed form furnished previously by Dean & Payne. It contained blanks to be filled with answers of the applicant to the questions propounded, and was filled up accordingly. Dean & Payne immediately forwarded it to Milwaukee. On the 24th of the same month the company considered the application and decided to issue the policy. It was issued accordingly, and bears date on that day. The premium to be paid by the assured was $302.52. The policy was immediately sent to Dean & Payne. Not being called for, on the 2d of October

following they returned it to the company, and it was thereupon cancelled.

At the same time that the policy was applied for, an application was submitted for a loan by the company to Giddings of $6,000. In relation to this matter there is some conflict in the evidence, but as the view which we take of the case before us renders it unnecessary to consider that subject, we pass it by without further remark.

The seventh section of the act incorporating the appellee is as follows: —

"Every person who shall become a member of this corporation, by effecting insurance therein, shall, the first time he effects insurance and before he receives his policy, pay the rates that shall be fixed upon and determined by the trustees; and no premium so paid shall ever be withdrawn from said company, except as hereinafter provided, but shall be liable to all the losses and expenses incurred by this company during the continuance of its charter."

The policy, as made out, was according to the form issued by the company in all cases. Among other things it provided, —

"7th, This policy shall not take effect and become binding on the company until the premium be actually paid, during the lifetime of the person whose life is assured, to the company or to some person authorized to receive it, who shall countersign the policy on receipt of the premium."

Giddings was taken ill of acute pleurisy on or about the 15th of August, 1872, and died of that disease on the 4th of September following. On the 12th or 13th of November following, the appellants, by their attorney, tendered to Dean, of the firm of Dean & Payne, the first premium and demanded the policy. The attorney had also present proof of the death of Giddings. Dean "refused to have anything to do with the matter, as he claimed that the company was not liable." The proof of the death was thereupon transmitted to the home office at Milwaukee.

Neither a tender of the premium nor a demand for the policy was made by any one until the time before mentioned, and no notice was given by Giddings or by any one in his

behalf during his life that he intended to consummate the transaction by paying the premium and receiving the policy. All action on his part terminated with the delivery of his application to Dean & Payne for transmission to the company. He did nothing afterwards. There his connection with the affair ended.

Upon this state of facts the appellants insist that the company is liable for the $6,000 specified in the undelivered policy.

A few remarks will be sufficient to dispose of the case.

The presentment of the application to the agents at Chicago, its transmission to Milwaukee, and its receipt by the company, in nowise committed or bound the latter to anything. It was competent for the company to pause as long as they might deem proper, and finally to accept or reject the application as they might choose to do. If they elected to contract, they had the right to prescribe the terms, and it was for the other party to assent to or reject them. His unbroken silence, as would have been such silence by the company after receiving the application, was necessarily negation. Neither party in such case would have been bound in any wise to the other, because there would have been wanting the mutual assent of the minds of the parties, which is vital in all cases to the creation of a contract obligation. What was done, without something further, could have no more weight or efficacy, in the view of the law, than an unexpressed thought or any other unexecuted intention.

The company prepared the draft of a contract which they were willing to execute. Among its stipulations was one that the assurers should not be bound by the instrument until the premium was paid in the lifetime of the assured, and the policy was countersigned by the authorized agent of the company. This was a condition precedent to the liability of the appellee, and necessary to its safety. There was nothing in it unconscionable or oppressive, and the company had a clear legal right to make it.

Where a condition is subsequent and it is broken, relief may be given upon equitable terms; but where it is precedent, and neither fulfilled nor waived, no right or title vests, and equity

can do nothing for the party in default. *Davis* v. *Gray*, 16 Wall. 203.

Here there was clearly no performance by the applicant, and it is equally clear that hence there was no contract or obligation whatsoever on the part of the company.

It was the business of the applicant, if, after sending forward his application, he continued to desire a policy, to keep up the proper communication with Dean & Payne, and during his lifetime to avail himself of the offer which the company had made. The proposition of the company expired with his life. After his death, his legal representatives could not act vicariously for him. To allow them to enforce such a claim would be contrary to the plainest principles of both law and equity. If authorities in so plain a case are needed, it is sufficient to refer to *Insurance Company* v. *Young's Administrator* (23 Wall. 85), and *Piedmont, &c. Life Insurance Co.* v. *Ewing*, 92 U. S. 377.

What the consequence would have been if, after the applicant was stricken with his mortal disease, the premium had been paid and the policy delivered, the company being ignorant of his changed condition, is a point which we do not find it necessary to consider.

Decree affirmed.

PEARCE *v.* MULFORD.

1. To entitle an improvement to protection under the patent laws, it must be the product of the exercise of the inventive faculties, and involve something beyond what is obvious to persons skilled in the art to which it relates.
2. Reissued letters-patent No. 5774, granted Feb. 24, 1874, to "Shubael Cottle, assignor to Mulford, Hale, & Cottle," for an improvement in chains and chain links for necklaces, &c., are void, the first claim for want of patentability in the alleged invention, and the second for want of novelty.
3. *Quære*, whether said first claim is not also void for want of novelty.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

This is a suit by Lewis J. Mulford, Seth. W. Hale, Shubael Cottle, and Samuel P. Baker, doing business under the firm

name of Mulford, Hale, & Cottle, against Thomas D. Pearce. The complainants' bill prays for an injunction to restrain his infringement of reissued letters-patent No. 5774, granted to the complainants as assignees of Shubael Cottle, Feb. 24, 1874, for an alleged new and useful improvement in chains and chain links for necklaces, &c., upon the surrender of original letters No. 147,045, granted Feb. 3, 1874. The bill also prays for an account of profits and damages. The defendant's answer admits the manufacture and sale of the chains made in the mode described in the letters, but denies the novelty and patentability of the alleged invention.

The specification forming a part of said reissued letters, together with the drawings therein referred to, is as follows: —

"Be it known that I, Shubael Cottle, of the city, county, and State of New York, have invented a new and useful improvement in chains for necklaces, &c.; and I do hereby declare that the following is a full, clear, and exact description of the same, reference being had to the accompanying drawing, forming a part of this specification, in which —

"Figure 1 is a side view of a portion of a chain necklace illustrating my invention. Fig. 2 is a view of the same turned one-quarter around. Fig. 3 is a cross-section of the same, taken through the line x x, Fig. 1.

"My invention has for its object to furnish an improved chain for necklaces, &c., having links of peculiar construction, which enable all the links to be finished separate, and then put together to form the chain. The invention consists in an ornamental chain whereof the links are connected together by open spiral links B finished before being connected together, the connection being made by springing the finished links into each other in the manner described.

"I will now describe the chain represented in the drawing to illustrate my invention.

"A and B represent the links of the chain. The links A are round and closed, as shown in Fig. 1, and are made and polished or colored separately from the other links. The links B, which constitute the peculiar feature of my invention, are formed of one or more coils of tubing of the proper length, so as to form a double spring-link. Into each end of the tube forming the link B is soldered a small shot, as shown in the drawing, which shot gives a finish to the link. The links B may then be colored or polished,

and the chain is formed by springing the links into each other. The links A B may be made the one kind round and the other oval, or both may be made round, or both oval.

"The first construction is preferred, as producing a more elegant chain. Either kind of the links A B may be polished and the other colored, or both may be polished or both colored; but I prefer to polish the closed links and color the open spiral links, as producing a more pleasing effect. By this construction the links may be made and finished in quantities, and the chain formed from the finished links by springing them into each other to produce any desired combination of the links of the same or different kinds. Finishing the separate links in this way enables them to be more perfectly polished or colored, and with a greatly diminished expenditure of labor and time, and enables the links to be put together without injuring them in the least, however highly they may be polished or colored.

"Having thus described my invention, what I claim is —

"1. An ornamental chain for necklaces, &c., formed of alternate closed links A and open spiral links B, substantially as shown and described.

"2. The open spiral link B formed of coils of tubing, substantially as shown and described.

SHUBAEL COTTLE."

Fig. 1.

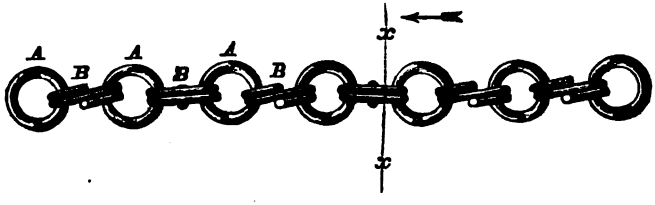

Fig. 2.

Fig. 3.

The court below sustained the validity of the letters, enjoined the defendant from infringing them, and awarded damages to the complainants. Pearce thereupon appealed.

Mr. Henry Baldwin, Jr., for the appellant, cited *Phillips* v. *Page*, 24 How. 164; *Rubber Tip Pencil Company* v. *Howard*, 20 Wall. 498; *Collar Company* v. *Van Dusen*, 23 id. 530; *Dalton* v. *Jennings*, 93 U. S. 271; *Glue Company* v. *Upton*, 97 id. 3; *Rubber-Coated Harness Trimming Company* v. *Welling*, id. 7.

Mr. Benjamin F. Lee, contra.

Cottle having accomplished in the manufacture of gold chains a new and useful result, an increase of efficiency, and a decided saving in the operation, was clearly entitled to a patent. *Gayler* v. *Wilder*, 10 How. 477, 484; *Smith* v. *Goodyear Dental Vulcanite Co.*, 93 U. S. 486; *Rich* v. *Lippincott*, 2 Fish. Pat. Cas. 4; *Strong* v. *Noble*, 3 id. 586; *Goodyear Dental Vulcanite Co.* v. *Willis*, 7 Pat. Off. Gaz. 41; *Dalton* v. *Nelson*, 9 id. 1112; *Walton* v. *Potter*, 3 Man. & G. 438; Curtis, Patents (4th ed.), Prel. Obs. p. xxx.

MR. JUSTICE STRONG, after stating the case, delivered the opinion of the court.

In view of the evidence found in the record, it cannot be questioned that ornamental chains composed of alternate closed links and spiral links, or formed by spiral links alone, had been known and in use long before Cottle made his alleged invention. As was said by the circuit judge, "Chains formed by split rings which are sprung into each other, or into a solid link, are familiar articles, and there can be no novelty in the mere shape or form of the chain, or of the link which is shown in the drawings of the patent." There is abundant evidence, not only that split rings had been long in use, but that other spiral links had been made and used before 1873, when the patentee claims to have made his invention. If, therefore, there be any novelty in the link which is the subject of the second claim, it must consist in the fact that the spiral link is formed of tubing. Tubing itself, as understood in the jeweller's art, is made by compressing a strip of gold around a brass or copper wire, and then forcing it through a draw-plate, the holes in which decrease gradually in diameter until the edges of the gold strip are com

pletely united. The copper wire is then eaten out by an acid, and the tubing is complete. Both the product and process have long been well known. And so have been spiral rings formed of gold tubing. The tubing, before the wire is removed, is wound into coils around a mandrel, and cut into desired lengths. The coils may then be pressed together by a wire and annealed, the wire having been removed, or the compressing and annealing process may be omitted. Such spirals have a certain degree of elasticity, which enables them to be sprung upon other links, and when thus sprung into other closed or open spirals they will form a chain. The well-known serpent bracelet was such an open spiral, such a double link, and several of them, sprung together alternately with closed links, would have formed a chain identical in principle with that of the patentee. There certainly is nothing patentable in merely reducing the size of the bracelet so as to adapt it to use in a necklace. The record also contains evidence that other spiral rings or links made of gold tubing, some of them open and some closed, by soldering, were made before 1873. It is to be observed that the second claim in the patent is not for any process of making a link; not for making tubing, or winding it into spiral forms; not for tying or annealing the coils when they have been wound: but for an open link, consisting of one or more coils of tubing of the proper length, so as to form a double spring link, into each end of which is soldered a small shot to give the link a finish. This is all the description the specification gives of the link. It is not intimated that the coils must be brought into close contact with each other, or annealed, and it is simply said the links may be colored or polished. The form of the link, when made of gold tubing, is all that is attempted to be patented. The constituents are not. The patentee has testified that as long as he had known anything about the manufacture of jewelry he had known tubing to be used in the art; that for many years he had known shot put into the ends of such tubing, and that for a number of years he had known links formed of tubing with shotted ends. We think, therefore, the evidence sufficiently establishes that the second claim is void for want of novelty in the alleged invention.

The first claim read in connection with the description given in the specification and drawings is for an ornamental chain, consisting of solid links and open spiral links made of tubing, the latter being finished before they are sprung into the solid links, and the connection being made by thus springing the links together. In considering whether this can be sustained, it is necessary to observe what was the state of the art, and what was known when Cottle claims to have invented the device for which he obtained the patent. Chains having alternate open and closed links, the open links being spiral and sprung into the closed links, were known. So were chains made entirely of spiral links, and even of open spiral links. A chain had also been made and worn, and it was for sale in the stores, the links of which were hollow. They were made solid, with copper wire inside. The copper wire was then destroyed, leaving the links hollow, and they were then sprung together to form a chain. The chain was thus composed of open spiral links made of hollow metal; that is, of tubing. It is true, as appears from the model which is an exhibit in the case, the two ends of the spiral were bent outward and the coils were soldered together after the links had been sprung into each other. Still, when thus sprung into each other, they made a chain formed of open spiral links of tubing. The soldering was a distinct and after process. Omitting that process and the outward deflection of the ends, and alternating the links with other links made closed and solid, the chain would have been substantially the same as that of the complainants. We cannot think the advance which the patentee made upon that can be called invention. Leaving the links open after they have been sprung into closed links, there being no novelty in the links themselves, cannot be patentable. It is nothing more than the exercise of ordinary mechanical skill. If in one of the complainants' chains, after the links had been joined, a person should solder the spirals together or to the closed rings, it could hardly be maintained that a new chain had been invented. Or if, when thus soldered, the soldering should be removed, the change would not deserve to be regarded as a product of invention. Yet this is substantially what the patentee has done. His chain may have been an improve-

ment on the chains that preceded it. In some particulars it doubtless was. It left the elasticity of the spiral gold tubing more free by releasing the link from the attachment of the soldering, and it enabled the chain to be freely taken in pieces without injury to its structure. But all improvement is not invention, and entitled to protection as such. Thus to entitle it, it must be the product of some exercise of the inventive faculties, and it must involve something more than what is obvious to persons skilled in the art to which it relates.

In this case neither the tubing, nor the open spiral link formed of tubing, nor the process of making either the open or the closed link, nor the junction of closed and open spiral links in a chain, was invented by the patentee. We are, therefore, constrained to hold that the first claim of the patent, even if not void for want of novelty, is void for want of patentability.

The decree of the Circuit Court will therefore be reversed, and the cause remanded with directions to dismiss the bill.

So ordered.

SCHOONMAKER *v.* GILMORE.

The courts of the United States, as courts of admiralty, have not exclusive jurisdiction of suits *in personam*, growing out of collisions between vessels while navigating the Ohio River.

MOTION to dismiss a writ of error to the Supreme Court of the State of Pennsylvania, to which is united a motion to affirm.

This was an action on the case, brought in the Court of Common Pleas of Allegheny County, Pennsylvania, by Gilmore against Schoonmaker & Brown, owners of the steam-tug "Jos. Bigley." The declaration avers in substance that, by reason of the negligence of the defendants, the tug, when descending the Ohio River, a few miles below Pittsburgh, collided with and damaged certain barges belonging to the plaintiff.

The point was made by the defendants that the courts of the United States have exclusive jurisdiction in cases of collision on navigable waters.

There was a judgment for the plaintiff, on the affirmance of which by the Supreme Court the defendants sued out this writ.

Mr. Alexander M. Watson in support of the motions.
Mr. Hill Burgwin, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The single question in this case is, whether the courts of the United States, as courts of admiralty, have exclusive jurisdiction of suits *in personam*, growing out of collisions between vessels while navigating the Ohio River. This is a Federal question, and gives us jurisdiction; but we cannot consider it as any longer open to argument, as it was decided substantially in *The Moses Taylor*, 4 Wall. 411; *The Hine* v. *Trevor*, id. 555; *The Belfast*, 7 id. 624; *Leon* v. *Galceran*, 11 id. 185; and *Steamboat Company* v. *Chase*, 16 id. 522. The Judiciary Act of 1789 (1 Stat. 73, sect. 9), reproduced in sect. 563, Rev. Stat., par. 8, which confers admiralty jurisdiction on the courts of the United States, expressly saves to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it. That there always has been a remedy at common law for damages by collision at sea cannot be denied.

The motion to dismiss is overruled, and that to affirm granted.

Judgment affirmed.

NOTE. — *Brown* v. *Davidson*, error to the Supreme Court of the State of Pennsylvania, involved the same question as the preceding case. It was submitted by the same counsel and determined in the same manner.

RAILWAY COMPANY v. HECK.

Neither the charge of the court below, if no exception was taken thereto before the final submission of the case to the jury, nor the granting or the refusing a new trial, is subject to review here.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The facts are stated in the opinion of the court.

Mr. E. Walker for the plaintiff in error.

Mr. O. B. Sansum, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

It does not appear from this record that any exceptions were taken in the progress of the trial to what was done by the court below. Nearly three weeks after the trial was concluded and a verdict rendered, a motion was made for a new trial, because of certain alleged errors in the charge; but it is nowhere shown that they were noted or brought to the attention of the court before the verdict. Certainly no exceptions were taken. A trial court may, in the exercise of its judicial discretion, grant a new trial, if convinced that its charge was wrong, even though its attention was not called to the error complained of before the case was finally submitted to the jury. But not so with us. Our power is confined to exceptions actually taken at the trial. The theory of a bill of exceptions is that it states what occurred while the trial was going on. Time is usually given to put what was done into an appropriate form for the record; but, unless objection was made and exception taken before the verdict, no case is presented for a review here of the rulings at the trial. This has been settled in this court since *Walton* v. *United States*, 9 Wheat. 651. The cases are numerous to that effect.

We have uniformly held that, as a motion for new trial in the courts of the United States is addressed to the discretion of the court that tried the cause, the action of that court in granting or refusing to grant such a motion cannot be assigned for error here. *Schuchardt* v. *Allens*, 1 Wall. 359; *Insurance Company* v. *Barton*, 13 id. 603.

Judgment affirmed.

BANKING ASSOCIATION v. INSURANCE ASSOCIATION.

1. An appeal will be dismissed when it appears from the record, taken as a whole, that the amount actually in controversy is not sufficient to give the court jurisdiction.
2. *Gray* v. *Blanchard* (97 U. S. 564) reaffirmed.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The facts are stated in the opinion of the court.

Mr. J. D. Rouse and *Mr. William Grant* for the appellant.
Mr. Charles B. Singleton, Jr., *contra.*

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

From this record it appears affirmatively that the only dispute between the parties is as to the right of the insurance association to withhold a transfer of stock until an indebtedness of a stockholder to it for $2,074.36 is paid. Such being the case, we have no jurisdiction of this appeal. In *Gray* v. *Blanchard* (97 U. S. 564) we held that a writ of error must be dismissed when it appears from the record, taken as a whole, that the amount actually in controversy between the parties was not sufficient to give us jurisdiction.

Appeal dismissed.

HAYES v. FISCHER.

1. An appeal is the only mode by which the appellate jurisdiction of this court can be exercised in equity suits, brought in the courts of the United States, and it does not lie before a final decree has been rendered.
2. A proceeding in the court below for contempt cannot be re-examined here by an appeal or a writ of error.

MOTION to dismiss a writ of error to the Circuit Court of the United States for the Southern District of New York.

The facts are stated in the opinion of the court.

Mr. Charles F. Blake in support of the motion.
Mr. J. H. Whitelegge, *contra.*

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Fischer, the defendant in error, brought a suit in equity in the Circuit Court of the United States for the Southern District of New York, to restrain Hayes, the plaintiff in error, from using a certain patented device. In this suit an interlocutory injunction was granted. Complaint having been made against Hayes for a violation of this injunction, proceedings were instituted against him for contempt, which resulted in an order by the court that he pay the clerk $1,389.99 as a fine, and that he stand committed until the order was obeyed. To reverse this order, Hayes sued out this writ of error, which Fischer now moves to dismiss, on the ground that such proceedings in the Circuit Court cannot be re-examined here.

If the order complained of is to be treated as part of what was done in the original suit, it cannot be brought here for review by writ of error. Errors in equity suits can only be corrected in this court on appeal, and that after a final decree. This order, if part of the proceedings in the suit, was interlocutory only.

If the proceeding below, being for contempt, was independent of and separate from the original suit, it cannot be re-examined here either by writ of error or appeal. This was decided more than fifty years ago in *Ex parte Kearney* (7 Wheat. 38), and the rule then established was followed as late as *New Orleans* v. *Steamship Company*, 20 Wall. 387.

It follows that we have no jurisdiction.

Motion granted.

TIERNAN v. RINKER.

1 An act of the legislature of Texas, entitled "An Act regulating taxation," approved June 3, 1873, provides in its third section that "there shall be levied on and collected from every firm or association of persons . . . pursuing the occupation of selling spirituous, vinous, malt, and other intoxicating liquors in quantities less than one quart, $200; in quantities of a quart and less than ten gallons, $100; provided that this section shall not be so construed as to include any wines or beer manufactured in this State." A., who was pursuing, in that State, "the occupation of selling spirituous, vinous, malt, and other intoxicating liquors in quantities less than one quart," filed his petition, setting forth that the wines and beer which he was selling were the manufacture, not of that State, but of other States and of foreign nations, and praying that the county treasurer be enjoined from collecting the tax imposed by said act of 1873, on the ground of its repugnance to the Constitution of the United States. *Held*, that, as he was also engaged in selling other liquors, the injunction was properly refused.

2. That act is inoperative only so far as it discriminates against imported wines or beer. A person cannot, for selling either of them, be subjected to a higher tax than that imposed for selling wines or beer manufactured in the State.

ERROR to the Supreme Court of the State of Texas.

A statute of Texas, entitled "An Act regulating taxation," approved June 3, 1873, enacts as follows: —

"SECT. 3. That there shall be levied on and collected from every person, firm, or association of persons, pursuing any of the following named occupations an annual tax (except when herein otherwise provided), on every such occupation or separate establishment, as follows: For selling spirituous, vinous, malt, and other intoxicating liquors, in quantities less than one quart, $200; in quantities of a quart and less than ten gallons, $100: *Provided*, that this section shall not be so construed as to include any wines or beer manufactured in this State, or when sold by druggists for medicinal purposes: *And provided further*, that this section shall not be so construed as to authorize druggists to sell spirituous or intoxicating liquors, except alcohol. For selling in quantities of ten gallons and over, $100.

"SECT. 4. That the county courts of the several counties of this State shall have the power of levying taxes equal to the one-half of the amount of the State tax herein levied, except as hereinbefore provided: *And provided further*, that any one wishing to pursue any of the vocations named in this act for a less period than

one year may do so by paying a *pro rata* amount of such occupation for the period he may desire: *Provided further*, that no occupation license shall issue for a less period than three months: *And provided further*, that the receipt of the proper officer shall be *prima facie* evidence of the payment of such tax."

In pursuance of the authority conferred by this statute, the county court of Galveston County, in March, 1876, levied a tax upon certain parties engaged in the occupations mentioned in the third section, equal to one-half the tax levied by the State.

Barney Tiernan and a number of others, who were the petitioners in the court below, are engaged in the county of Galveston in the occupation of "selling spirituous, vinous, malt, and other intoxicating liquors," some of them in quantities less than one quart, and others in quantities of one quart and less than ten gallons; and the wines and beers which they sell are not of the manufacture of the State. By the present suit against Rinker, the treasurer of that county, they seek to enjoin the enforcement of the tax against them, on the alleged ground that the statute is invalid in that it discriminates in favor of wines and beer manufactured in the State against those which are manufactured elsewhere. The District Court of the State sustained a demurrer to their petition and dismissed the case. The Supreme Court of the State affirmed the decision. The petitioners thereupon sued out this writ of error.

Mr. A. H. Willie for the plaintiffs in error.

The statute subjects to a tax persons engaged in the pursuit of a given occupation, which is defined to be the selling of spirituous, vinous, malt, and other intoxicating liquors.

The first proviso embraces the plaintiffs in error, as their occupation is that of selling vinous and malt liquors which are not manufactured in Texas, and of spirituous and other intoxicating liquors. It discriminates in favor of wines or beer manufactured in Texas, and against those liquors if they are the product of other States or of foreign nations. The statute is, therefore, a regulation of commerce and is repugnant to the Constitution. *Welton* v. *State of Missouri*, 91 U. S. 275.

The proviso is an essential part of the statute. Its office is to restrain the enacting clause and to except something which would otherwise have been within it, or, in some measure, to modify it. *Wayman* v. *Southard*, 10 Wheat. 1. The court can no more limit the legal effect of terms, because they are in a proviso, than it can qualify the terms of a private agreement, because they are in one part of the instrument instead of another. *Dugan* v. *Bridge Company*, 27 Pa. St. 310.

To strike out the proviso as unconstitutional, and yet sustain the statute as imposing the tax upon the sale of spirituous, vinous, malt, and other intoxicating liquors indifferently, would defeat its obvious intention, which is to encourage the manufacture of Texas wines and beer. Where a statute is clearly made up of parts, sections, or provisions, one part will not be held good and another bad, unless the respective parts are independent of each other. *State* v. *Commissioners of Perry County*, 5 Ohio St. 507; Potter's Dwarris, 249. The constitutional parts can stand only when, after rejecting the others, the object and effect of the law are not destroyed. *State* v. *Estabrook*, 8 Nev. 180. The whole must fall, if, after rejecting the unconstitutional parts, the remainder is incapable of being executed in accordance with the legislative intent. Cooley, Const. Lim. 178; *Washington* v. *The State*, 13 Ark. 763. Where the different provisions form inseparable parts of the same system, the whole is invalidated by the unconstitutionality of a part. *People* v. *Detroit*, 29 Mich. 108; Sedgwick, Stat. Law, 414, and cases cited.

No counsel appeared for the defendant in error.

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court.

The petitioners rely upon the ruling of this court in the case of *Welton* v. *State of Missouri* to sustain their position. There the State had exacted the payment of a license tax from travelling pedlers who dealt in the sale of goods, wares, and merchandise which were not the growth, product, or manufacture of the State, and required no such license tax from similar traders selling goods which were the growth, product, or manufacture of the State. And this court held, following in that respect the

ruling in *Brown* v. *Maryland*, that the tax exacted from dealers in goods before they could be sold was in effect a tax upon the goods themselves, and that the legislation which thus discriminated against the products of other States in the conditions upon which they could be sold by a certain class of dealers was in conflict with the commercial clause of the Constitution.

In deciding the case, the court observed that the power conferred by this clause to regulate commerce with foreign nations and among the several States is without limitation; and that to regulate commerce is to prescribe the conditions upon which it shall be conducted; to determine how far it shall be free from restrictions; how far it shall be subjected to duties and imposts; and how far it shall be prohibited; that when the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of State authority; that the portion of commerce with foreign countries or between the States, which consists in the transportation and exchange of commodities, is of national importance and admits and requires uniformity of regulation; that the object of vesting this power in the general government was to insure this uniformity against discriminating State legislation; and that to that end this power must cover the property which is the subject of trade from hostile or interfering legislation until it has become a part of the general property of the country and subject to similar protection and to no greater burdens. If, before that time, the property can become subject to any restrictions by State legislation, the object of vesting the control in Congress may be defeated. If the State can exact a license tax from one class of traders for the sale of goods which are the growth, product, or manufacture of other States, it can exact the license from all traders in such goods, and the amount of the tax will rest in its discretion. "Imposts," the court said, "operating as an absolute exclusion of the goods, would be possible, and all the evils of discriminating State legislation favorable to the interests of one State and injurious to the interests of other States and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the States."

The court, therefore, held that the commercial power of the Federal government over a commodity continued until the commodity had ceased to be the subject of discriminating legislation in any State by reason of its foreign character, and that this power protects it after it has entered the State from any burdens imposed by reason of its foreign origin. The court also held that the inaction of Congress to prescribe any specific rules to govern inter-state commerce, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that inter-state commerce shall be free and untrammelled, and that this policy would be defeated by discriminating legislation like that of Missouri.

The doctrine of this case has never been questioned; it has been uniformly recognized and approved, and expresses now the settled judgment of the court.

According to it, the statute of Texas is inoperative, so far as it makes a discrimination against wines and beer imported from other States, when sold separately from other liquors. A tax cannot be exacted for the sale of beer and wines when a foreign manufacture, if not exacted from their sale when of home manufacture. If a party be engaged exclusively in the sale of these liquors, or in any business for which a tax is levied because it embraces a sale of them, he may justly object to the discriminating character of the act, and on that account challenge its validity, under the decision in question; but if engaged in the sale of other liquors than beer or wines, he can not complain of the State tax on that ground. The statute makes no discrimination in favor of other liquors of home manufacture. Whilst it groups the sale of several kinds of liquors as one occupation, it evidently intends that the occupation which consists in the sale of any one of the several liquors named, in the quantities mentioned, shall be subject to taxation, as though it read, "for selling spirituous, or vinous, or malt, or other intoxicating liquors." It does not require to justify the tax that a party shall be engaged in the sale of all the liquors mentioned, as well as other liquors. This being the true construction of the act, there can be no objection to its enforcement where the tax is levied for occupations for the sale of other liquors than wines and beers. In the present

case the petitioners describe themselves as engaged in the occupation of selling spirituous, vinous, malt, and other intoxicating liquors; that is, in all the liquors mentioned and others not mentioned. There is no reason why they should be exempted from the tax when selling brandies and whiskies and other alcoholic drinks, in the quantities mentioned, because they could not be thus taxed if their occupation was limited to the sale of wines and beer.

We see, therefore, no error in the ruling of the Supreme Court of Texas, and its judgment is accordingly

Affirmed.

BALL v. LANGLES.

1. Reissued letters-patent No. 4026, granted June 14, 1870, to Hosea Ball for a new and useful improvement in ovens, are void, inasmuch as they contain new matter, and are for an invention different from that exhibited in the original specification and drawings.
2. The ruling in *Seymour* v. *Osborne* (11 Wall. 516) and *Russell* v. *Dodge* (93 U. S. 460), touching the authority of the Commissioner of Patents in granting a reissue of letters-patent, reaffirmed.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The facts are stated in the opinion of the court.

Mr. Thomas J. Durant and *Mr. Charles W. Hornor* for the appellants.

Mr. Conway Robinson and *Mr. Leigh Robinson, contra.*

MR. JUSTICE STRONG delivered the opinion of the court.

This is a bill in equity filed by Hosea Ball and Margaret Haughery, against Justin Langles and N. A. Baumgarden, composing the firm of Baumgarden & Langles. It charges an infringement by the defendants of reissued letters-patent granted to Ball, June 14, 1870, for an alleged new and useful improvement in ovens. The original patent was granted to him on the 23d of September, 1856, for a period of fourteen years from that date. On the 12th of October, 1869, this

original was surrendered, and a reissue was granted. A second reissue was granted on the 14th of June, 1870, numbered 4026. Subsequently an extension of the patent was granted for seven years, from Sept. 23, 1870. It is upon the second reissue (No. 4026), thus extended, that this suit is founded. The charge of the bill is, that the defendants have constructed such an oven as that patented, with intent to use it. The Circuit Court dismissed the bill, and from that decree the complainants have appealed.

The first question now to be considered under the pleadings and evidence is, whether the reissued patent (No. 4026) is valid. One of the defences set up by the answer is, that the reissue is not for the same invention as that described, claimed, and shown in the original letters, and it is averred that the surrender of those letters and the first reissue were for the purpose of introducing new matter not shown, suggested, or indicated in the specification, drawings, or model filed with the original application, and also for the purpose of obtaining a claim broader than the invention, and broad enough to cover the invention of subsequent inventors and patentees. If these averments of the answer are well founded the reissue is void, and it will be unnecessary to consider the other defences set up.

When the reissues of 1869 and 1870 were granted, the Commissioner of Patents had authority under the acts of Congress to grant reissues only in certain specified cases. These were whenever a patent was inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee's claiming as his own invention or discovery more than he had a right to claim as new, if the error had arisen by inadvertence, accident, or mistake, without any fraudulent or deceptive intention. The commissioner was invested with authority to determine whether the surrendered patent was valid by reason of a defective or insufficient specification, or because the patentee had claimed more than he had a right to claim as new; and if he found such to be the case, and found also that the error had been due to inadvertence, accident, or mistake, without fraud, his decision was conclusive, and not subject to review by the courts. But the law did not confer upon him jurisdic-

tion to grant a reissue embracing new matter, or a broader invention than what was revealed by the original specification, or drawings or models, except in some cases where there was neither model nor drawing. A reissue for anything more is, therefore, inoperative and void. Accordingly, this court has repeatedly held that if, on comparing a reissue with its original, the former appears on its face to be for a different invention from that described or indicated in the latter, it must be declared invalid. *Seymour* v. *Osborne*, 11 Wall. 516, 544; *Russell* v. *Dodge*, 93 U. S. 460.

In the original patent, Ball described his invention as consisting of an oven with a series of bread-receivers swung between the ends of a reel hung in an interior perforated chamber, and capable of rotation on a horizontal shaft; an arrangement being provided for the self-delivery of the bread from the front of the oven, as afterwards set forth. Having thus described it generally, he proceeded to set forth in detail its construction, including the mode in which it was heated. This was done in part by explanation of his drawings. A fire-chamber was represented below the oven, with an ash-pit beneath. Above the fire-chamber, but beneath the oven, a space through which the products of combustion passed on their way to the chimney, communicating by openings with the vertical side and back flues. These flues were exterior to the oven proper, but they communicated with the interior chamber or oven by perforations or openings. In this interior chamber the bread was placed on platforms hung on a revolving reel, and a mode of discharge and filling was described. The specification then stated that, "owing to the perforated sides and back of the interior chamber, all parts of it receive the full heat of the oven, suitable dampers regulating the course of the products of combustion to the chimney." Such was the description, so far as it is necessary to state it. The single claim of the patent was as follows: "What I claim and desire to secure by letters-patent is the perforated interior chamber, in combination with the rotary reel and the swinging platform thereon, self-discharging, substantially as set forth."

It is evident from this description and from the attendant drawings that the interior chamber or oven was so constructed.

that what are called "the products of combustion" did not and could not pass directly into it. The chamber was heated by those products passing through the exterior flues on the sides and back. There was no direct communication between the space above the fire-chamber and the interior of the oven, and no communication at all except indirectly through the perforations in the vertical flues on the sides and back of the oven. The interior chamber was heated for baking by heat radiating from its walls, except the comparatively small quantity which was permitted to enter through the small perforations in the flues. It is impossible to detect in the specification or drawings any intention or hint even of conducting the products of combustion (whatever may have been meant by the phrase, whether heat, gases, or smoke, or all of them) directly into the baking-chamber. Not a single ray of heat could enter the chamber, radiated from the fire. No passage was provided through the bottom, and even the perforations in the sides must have been ineffectual to divert the ascending heat from its upward course through the flues.

If, now, we turn to the reissues of 1869 and 1870, it cannot be doubted that while they claim what was claimed in the original, they claim much more. They claim an entirely different mode of heating the chamber, necessitating a radical difference in the construction of the oven.

The specification of the reissue of 1870, as well as that of 1869, instead of representing the space above the fire-chamber as communicating with the interior chamber only indirectly through perforations in the vertical and back flues, described it as communicating "directly or indirectly in any proper manner with the chamber in which the bread-receiving shelves or platforms are revolved." The patentee says, "The flues and openings to permit the passage or circulation of gases into or through the bread-chamber may be located and arranged in any effective manner." Thus the flues and openings may be made through the bottom of the oven and immediately over the fire, admitting direct radiation from the fire-chamber. And he claims "one or more swinging bread-holders, suspended from the arms or end plates of a rotating reel in combination with a furnace so arranged and connected that the products of

combustion will pass into or through the chamber within which the bread-holders move." Thus his reissued patent has become one for an oven in which there may be no diaphragm or partition separating the compartment in which the dough is placed from the furnace by which it is heated, and which may be directly under it. Thus the oven is made a part of the passage-way for the products of combustion from the fire-chamber to the chimney. That this is a very different invention from anything exhibited in the original specification and drawings is too obvious to need further elucidation. We cannot doubt that the purpose of the reissues was not to cure defects in the original specification, or any deficiency in describing the invention, but to cover other devices which the patentee had not in mind when he first applied for his patent, and which may have subsequently come to his knowledge. Thirteen years after the patent was granted had elapsed before he applied for any reissue. However this may be, the reissued letters are so clearly for a different invention from that for which the patentee first applied, containing new matter, and so much broader, that we are constrained to hold that the Commissioner of Patents had no authority to grant them, and consequently that they are void.

The complainants' bill was, therefore, rightly dismissed.

Decree affirmed.

FRENCH v. WADE.

1. A.'s lands in Louisiana were, May 6, 1865, duly forfeited to the United States by a decree of the proper court in the exercise of the jurisdiction conferred by the Confiscation Act of July 17, 1862 (12 Stat. 589), as modified by the joint resolution of even date therewith. Id. 627. A. purchased them under the decree, and, on receiving from the marshal a deed therefor, bargained and sold them to B. in fee, by an authentic act of sale, with all legal warranties. On the death of A., his heirs-at-law sued B. for the possession of the lands. *Held*, that they were entitled to recover.
2. *Wallach et al.* v. *Van Riswick* (92 U. S. 202) reaffirmed.

ERROR to the Circuit Court of the United States for the District of Louisiana.

This was a suit brought March 14, 1878, against Joseph M. French, by the heirs-at-law of Henry F. Wade, Jr., to recover the possession of certain real estate in the city of New Orleans.

Wade was the owner of the property when it was seized and a libel for its condemnation filed in the proper District Court of the United States, under the act of July 17, 1862 (12 Stat. 589), commonly called the Confiscation Act, and the joint resolution of even date therewith. Id. 627. It was condemned May 6, 1865, as forfeited to the United States, and sold under a writ of *venditioni exponas*, Oct. 21, 1865. Wade was the purchaser, and he and his wife, by an authentic act passed before S. Magner, notary public, on the thirtieth day of that month, bargained and sold it in fee, with all legal warranties, to French. The latter took possession of it and made valuable improvements.

The act recites that the property was acquired by Wade "at a sale made by the marshal of the United States for the eastern district of Louisiana, by virtue of a writ of *venditioni exponas* to him directed by the District Court of the United States for that district, in the suit entitled *The United States* v. *One Piece of Ground*, &c., the property of Henry F. Wade, Jr., No. 7969 of the docket of said court, as per deed of said marshal, dated the 24th of October, 1865, recorded in the clerk's office of said court in sales-book B, folios 340 and 341, hereto annexed as part hereof; said property belonged to said Wade, Jr., defendant in said suit, for having acquired the same by donation from his father, Henry F. Wade, and his mother, Lucretia Martin, by act passed before Theodore Guyole, late notary, on the 17th of May, 1860, and the same belonged to said donor and his wife, as community property." Wade died Feb. 24, 1874.

Judgment was rendered in favor of the plaintiffs, and French sued out this writ of error.

Mr. Benjamin F. Jonas for the plaintiff in error.
Mr. John A. Campbell, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

We think the court below was right in holding that this case was governed by that of *Wallach et al.* v. *Van Riswick* (92 U. S.

202), in which we decided that after a seizure and an adjudicated condemnation and sale under the Confiscation Act of July 17, 1862 (12 Stat. 589), of the lands of one engaged in rebellion against the United States, there was "left in him no estate or interest of any description which he could convey by deed, and no power which he could exercise in favor of another" (p. 208), and that the joint resolution passed contemporaneously with the approval of the act was "intended for the benefit of his heirs exclusively, to enable them to take the inheritance after his death." p. 213. As to him, the forfeiture was complete and absolute; but the ownership after his death was in no wise affected (p. 209), except by placing it beyond his control while living. This case has been followed many times since. *Pike* v. *Wassell*, 94 U. S. 711. It must now be considered as the settled rule of decision in this court.

Wade, by the purchase of his own interest in the property, took the property to hold during his life, the same as any other purchaser. Whatever rights another could have acquired by the purchase, he got, but no more. Another could not, after purchase, have sold and conveyed the interest of the heirs in the property; neither can he. By the condemnation and sale, Wade's estate was separated entirely from that of his heirs after his death, and the heirs are not estopped by his warranty from asserting their title.

As the cause was tried below on the question of title only, and there are no findings in respect to the improvements put on the property by French, we cannot consider whether any allowances should be made to him on that account or not.

Judgment affirmed.

RAILROAD COMPANY v. MISSISSIPPI.

1. A petition for a *mandamus* was filed in one of her courts by the State of Mississippi to compel a railroad company, a corporation existing under the laws of that State, to remove a stationary bridge which it had erected over Pearl River, a navigable stream on the line between Louisiana and Mississippi. Thereupon the company presented its petition, duly verified, praying for the removal of the suit into the Circuit Court of the United States, and alleging that the right to erect, use, and maintain the bridge was vested by the company's charter; that its maintenance over said river was authorized by the act of Congress approved March 2, 1868 (15 Stat. 38); that thereunder it became a part of a post-road over which for several years the mails of the United States have been carried, and that therefore the suit impugns the rights, privileges, and franchises granted by said act. The petition was accompanied by a bond with good and sufficient security, conditioned as required by the act of March 3, 1875. 18 Stat. part 3, p. 471. *Held*, that under the latter act the company was entitled to the removal prayed for.
2. The decisions of this court affirming the jurisdiction of the courts of the United States in cases arising under the laws of the United States, or where a State is a party, cited and commented on.
3. The ruling in *Insurance Company* v. *Dunn* (19 Wall. 214) and *Removal Cases* (100 U. S. 457), that a party loses none of his rights who, after failing to obtain its removal, contests a suit on its merits in the State court, reaffirmed.

ERROR to the Supreme Court of the State of Mississippi.

The facts are stated in the opinion of the court.

Mr. John A. Campbell and *Mr. Thomas L. Bayne* for the plaintiff in error.

Mr. Alexander M. Clayton, contra.

MR. JUSTICE HARLAN delivered the opinion of the court.

The plaintiff in error, defendant below, filed a petition in the State court of original jurisdiction for the removal of this suit into the Circuit Court of the United States for the Southern District of Mississippi. The petition was accompanied by a bond, with good and sufficient surety, conditioned as required by the statute. The application for removal was denied, and the court, against the protest of the company, proceeded with the trial of the suit. A demurrer to the answer was sustained, and judgment was entered in behalf of the State. Upon a writ of error, sued out by the company, the Supreme Court of

Mississippi gave its sanction to the action of the inferior court upon the petition for removal, and affirmed, in all respects, its judgment upon the merits.

The first assignment of error relates to the action of the State court in proceeding with the trial after the filing of the petition and bond for removal of the suit. If the suit was one which the company was entitled, under the statute, to have removed into the Circuit Court of the United States, then all that occurred in the State court, after the filing of the petition and bond, was in the face of the act of Congress. *Gordon* v. *Longest*, 16 Pet. 97; *Kanouse* v. *Martin*, 15 How. 198; *Insurance Company* v. *Dunn*, 19 Wall. 214. Its duty, by the express command of the statute, was, the suit being removable, to accept the petition and bond, and proceed no further.

Among the cases to which the national Constitution extends the judicial power of the United States are those arising under the Constitution or laws of the Union. The first section of the act of March 3, 1875, determining the jurisdiction of circuit courts of the United States, and regulating the removal of causes from State courts, invests such circuit courts with original jurisdiction, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and "arising under the Constitution or laws of the United States." Under the second section of that act either party to a suit of the character just described may remove it into the Circuit Court of the United States for the proper district. The only inquiry, therefore, upon this branch of the case is, whether the present suit, looking to its nature and object as disclosed by the record, is, in the sense of the Constitution, or within the meaning of the act of 1875, one "arising under the Constitution or laws of the United States."

The action was commenced by a petition filed, in behalf of the State, against the New Orleans, Mobile, and Chattanooga Railroad Company (now known as the New Orleans, Mobile, and Texas Railroad Company), a corporation created in the year 1866, under the laws of Alabama, and by an act of the legislature of Mississippi, passed Feb. 7, 1867, recognized and approved as a body politic and corporate in that State, with

authority to exercise therein the rights, powers, privileges, and franchises granted to it by the State of Alabama.

The object of the action was to obtain a peremptory writ of *mandamus*, requiring the company to remove a stationary bridge which it had erected across Pearl River, on the line between Louisiana and Mississippi, and construct and maintain, in the central portion of the channel of that river, where the railroad crosses, a drawbridge which, when open, will give a clear space, for the passage of vessels, of not less than sixty feet in width, and provide, after its construction, for the opening of the drawbridge, without unnecessary delay, for any and all vessels seeking to pass through it.

The claim of the State is: —

1. That the construction and maintenance of a stationary bridge across Pearl River is in violation of the company's charter, an obstruction to the navigation of the river, and a public nuisance, resulting in great and irreparable damage to the people of Mississippi.

2. That Pearl River, by the common law and the law of nations, is a navigable river, in which the tide ebbs and flows above said bridge, is navigable for steamboats for more than two hundred miles, and has been so navigated from time immemorial; that the river is the boundary between Mississippi and Louisiana, neither of those States having power to authorize any obstruction to its free navigation; that by an act of Congress, entitled "An Act to enable the people of the western part of Mississippi Territory to form a constitution and State government, and for the admission of said State into the Union on an equal footing with the original States," passed March 1, 1817, it was, among other things, provided "that the Mississippi River and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, shall be common highways and for ever free, as well to the inhabitants of said State as to other citizens of the United States;" that those provisions constituted a condition on which the State of Mississippi was admitted into the Union, and an engagement on the part of the United States that all the navigable rivers and waters emptying into the Gulf of Mexico should for ever be free to all the inhabitants of the State of Mississippi; that Pearl River does lead and empty

into the Gulf of Mexico; that the bridge is such an obstruction to the navigation of Pearl River as to cause permanent injury, as well to the State of Mississippi and its inhabitants, as to the commerce of the United States and of the world, and, consequently, was in violation of the law.

The company resists the application for a *mandamus* upon several grounds.

It affirms that the bridge in question had been constructed and is maintained in accordance with its charter and conformably to the power and authority conferred by the States of Alabama, Mississippi, and Louisiana.

It further avers, in its answer, that the railroad is a great public highway through those States, connecting them with other portions of the United States; that Congress, in view of the magnitude and cost of the work, and to expedite its construction, by an act entitled "An Act to establish and declare the railroad and bridges of the New Orleans, Mobile, and Chattanooga Railroad, as hereafter constructed, a post-road, and for other purposes," approved March 2, 1868, authorized and empowered that corporation to construct, build, and maintain bridges over and across the navigable waters of the United States on the route of said railroad, between New Orleans and Mobile, for the use of the company and the passage of its engines, cars, trains of cars, mails, passengers, and merchandise, and that the railroad and its bridges, when complete and in use, were to be held and deemed lawful structures and a post-road; that the act of Congress required drawbridges on the Pascagoula, the Bay of Beloxi, the Bay of St. Louis, and the Great Rigolet, but none on Pearl River, power being reserved by Congress to amend or alter the act so as to prevent or remove material obstructions; that the company is authorized to maintain the bridge in question under that act of Congress; that the same is a lawful structure and a post-road, which no court can, consistently with the act of Congress, overturn or abate as illegal or as a nuisance.

On the day succeeding that on which its answer was filed, the company presented the petition for removal, to which reference has already been made, accompanied by a bond in proper form. That petition sets out the nature and object of the action, and claims that the right to erect and to maintain the

present bridge for the conveyance of the cars, trains, passengers, mails, and merchandise, vested in the company, "on a contract with the State of Mississippi in the enactment aforesaid; that the State of Mississippi has no power to repudiate that contract or to impair its obligations; that it is a vested right resting on a contract and supported and sustained by the Constitution of the United States, and that this cause is one arising under the Constitution of the United States."

It then proceeds: —

"And your petitioner further represents that the bridge aforesaid, and its maintenance over the said river in the manner in which it exists, is authorized by the act of Congress approved March 2, 1868, which authorized and empowered the said company to construct, build, and maintain bridges over and across the navigable waters of the United States on the route of the said railroad between Mobile and New Orleans, and that when constructed they should be recognized as lawful structures and a post-road, and were declared to be such; and the Congress reserved the power to alter the same when they become an obstruction to the navigable waters.

"Your petitioner says that the railroad and bridges are and have been for three or more years a post-road, over which the mails of the United States have been carried and are now being carried, and as the bridge referred to is a lawful structure under the laws of the United States, this suit impugns the rights, privileges, and franchises granted by the act of Congress aforesaid of the 2d March, 1868."

From this analysis of the pleadings, and of the petition for removal, it will be observed that the contention of the State rests, in part, upon the ground that the construction and maintenance of the bridge in question is in violation of the condition on which Mississippi was admitted into the Union, and inconsistent with the engagement, on the part of the United States, as expressed in the act of March 1, 1817. On the other hand, the railroad company, in support of its right to construct and maintain the present bridge across Pearl River, invokes the protection of the act of Congress passed March 2, 1868. While the case raises questions which may involve the construction of State enactments, and also, perhaps, general principles of law,

not necessarily connected with any Federal question, the suit otherwise presents a real and substantial dispute or controversy which depends altogether upon the construction and effect of an act of Congress. If it be insisted that the claim of the State, as set out in its petition, might, possibly, be determined by reference alone to State enactments, and without any construction of the act of 1817, the provisions of which are invoked by the State in support of its application for *mandamus*, the important, and, so far as the defence is concerned, the fundamental, question would still remain, as to the construction of the act of Congress of March 2, 1868. That act, the company contends, protects the present stationary bridge against all interference whatever, upon the part either of the State or of the courts. In other words, should the court be of opinion that the law is for the State, if the rights of parties were tested simply by the statutes of Alabama and Mississippi, it could not evade, but must meet and determine, the question, distinctly raised by the answer, as to the operation and effect of the act of Congress of 1868.

Is it not, then, plainly a case which, in the sense of the Constitution, and of the statute of 1875, *arises* under the laws of the United States?

If regard be had to the former adjudications of this court, this question must be answered in the affirmative.

It is settled law, as established by well-considered decisions of this court, pronounced upon full argument and after mature deliberation, notably in *Cohens* v. *Virginia*, 6 Wheat. 264; *Osborn* v. *Bank of the United States*, 9 id. 738; *Mayor* v. *Cooper*, 6 Wall. 247; *Gold-Washing & Water Company* v. *Keyes*, 96 U. S. 199; and *Tennessee* v. *Davis*, 100 U. S. 257.

That while the Eleventh Amendment of the National Constitution excludes the judicial power of the United States from suits, in law or equity, commenced or prosecuted against one of the United States by citizens of another State, such power is extended by the Constitution to suits commenced or prosecuted by a State against an individual, in which the latter demands nothing from the former, but only seeks the protection of the Constitution and laws of the United States against the claim or demand of the State;

That a case in law or equity consists of the right of one party, as well as of the other, and may, properly, be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either;

That cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim, or protection, or defence of the party, in whole or in part, by whom they are asserted;

That, except in the cases of which this court is given, by the Constitution, original jurisdiction, the judicial power of the United States is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct; and, lastly,

That it is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the Constitution or laws of the United States; but when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is within the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

These propositions, now too firmly established to admit of, or to require, further discussion, embrace the present case, and show that, whether we look to the Federal question raised by the State in its original petition, or to the Federal question raised by the company in its answer, the inferior State court erred, as well in not accepting the petition and bond for the removal of the suit to the Circuit Court of the United States, as in thereafter proceeding to hear the cause. It was entirely without jurisdiction to proceed after the presentation of the petition and bond for removal.

In view of our decisions in *Insurance Company* v. *Dunn* (19 Wall. 214), in *Removal Cases* (100 U. S. 457), and in other cases, it is scarcely necessary to say that the railroad company did not lose its right to raise this question of jurisdiction by contesting the case, upon the merits, in the State courts after

its application for the removal of the suit had been disregarded. It remained in the State court under protest as to the right of that court to proceed further in the suit, and there is nothing in the record to show that it waived its right to have the case removed to the Federal court, and consented to proceed in the State court, as if there had been no petition and bond for the removal.

The judgment of the Supreme Court of Mississippi will, therefore, be reversed, and the cause remanded for such orders as may be consistent with this opinion, and with directions that the court of original jurisdiction be required to set aside all judgments and orders made in this suit after the presentation of the petition and bond for its removal into the Circuit Court of the United States, and proceed no further in the suit; and it is

So ordered.

MR. JUSTICE FIELD did not sit in this case, nor take part in deciding it.

MR. JUSTICE MILLER dissenting.

I dissent from the opinion of the court in this case. It is always a matter of delicacy when a cause of which a court has undoubted jurisdiction is transferred, at the instance of one party, to another court of concurrent jurisdiction. It is especially so when the transfer is to be made to a Federal from a State court, without regard to the consent of the latter, and against the objection of the other party.

In such a case the right of removal should be made very clear on the application for that purpose. And when the application has been refused, and the State courts, up to the highest to which the cause can be carried, have considered and decided it upon its merits, the judgment finally rendered should not be treated as a nullity, unless the case upon which the want of jurisdiction of these courts depends is made very plain indeed.

I do not think such a case is presented here.

The removal is based upon the second section of the act of Congress of March 3, 1875, "to determine the jurisdiction

of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes." This enacts "that any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and *arising under the Constitution or laws of the United States*, or treaties made, or which shall be made, under their authority," may be removed by either party, on proper showing, to the Circuit Court of the United States. The decision is that this is a suit arising under a law of the United States, to wit, the act of Congress concerning the bridge of which plaintiff complains. I make no captious criticism by reason of the fact that the opinion of the court is mainly directed to the constitutional provision extending the judicial power of the United States to *cases* arising under that instrument and the laws and treaties made under its authority, while the word used in the statute is *suits*. The language of the Constitution may be broad enough to sustain a statute which authorizes the removal of a cause at any stage when a *case* is made, which, taken as a whole, requires a judgment based upon the Constitution, a law, or a treaty of the United States.

The act of 1875 is the first which ever attempted to give a right of removal on such ground, and it limits that right to *suits arising under* the Constitution, laws, or treaties of the United States. It does not give the right of removal where the *defence* arises under such a law, unless "suit" necessarily includes the defence which may be made thereto. The lexicons do not so define it. Bouvier's Law Dictionary says that in the practice of the law "suit" means "an action." Can a defence to an action be called the action? No more can the defence to a suit be called the suit. Webster says "suit" is the act of suing; the process by which one gains an end or object, and as a word in the law, he says it is "an attempt to gain an end by legal process;" "a legal application to a court for justice;" "an action or process for the recovery of a right of action." Does this mean the defence to an alleged right of action? Can it be held to mean the attempt to defeat an action? Worcester defines it thus: "In modern law, the prose-

cution of some claim or demand in a court of justice; judicial prosecution:" and perhaps this is as good a definition of the word, when used in reference to legal proceedings, as any that can be framed, and it is peculiarly applicable to the use of the word in the act of 1875.

In *Weston* v. *The City of Charleston* (2 Pet. 449), Mr. Chief Justice Marshall, in delivering the opinion of the court, conceding the term to be a very comprehensive one, says it applies "to any proceeding in a court of justice by which an individual *pursues that remedy* in a court of justice which the law affords him."

Taking the idea of a "suit" as thus defined, what is meant by the suit *arising* under a law of Congress? The obvious answer seems to be that the *cause of action is founded on* the act of Congress; that the *remedy* sought is one *given* by an act of Congress; that the *relief* which is prayed is a relief *dependent on* an act of Congress; that the right to be enforced in the suit is a right which rests upon an act of Congress. In all this I see no place for holding that a *defence* to a suit not so founded on an act of Congress, or a plea which the defendant may interpose to any ordinary action, though that plea be founded on an act of Congress, is a suit arising under an act of Congress.

Looking also to the reasons which may have influenced Congress, it may well be supposed that while that body intended to allow the removal of a suit where the very foundation and support thereof was a law of the United States, it did not intend to authorize a removal where the cause of action depended solely on the law of the State, and when the act of Congress only came in question incidentally as part (it might be a very small part) of the defendant's plea in avoidance. In support of this view, it may be added that he in such case is not without remedy in a Federal court; for if he has pleaded and relied on such defence in the State court, and that court has decided against him in regard to it, he can remove the case into this court by writ of error, and have the question he has thus raised decided here.

LANGFORD v. MONTEITH.

1. Where an act of Congress admitting a State into the Union, or organizing a territorial government, provides, in accordance with a treaty stipulation, that the lands in the possession of an Indian tribe shall not be a part of such State or Territory, the new government has no jurisdiction over them. *Harkness* v. *Hyde* (98 U. S. 476) qualified and explained.
2. Where, in a civil suit before a justice of the peace of the Territory of Idaho, it appears by the answer of the defendant, verified by his affidavit, that the question of title to real estate is necessarily involved, the justice should certify the case to the District Court for trial. If he proceeds to try it, it must, on appeal from his judgment, be dismissed.

ERROR to the Supreme Court of the Territory of Idaho.

The facts are stated in the opinion of the court.

The Attorney-General for the plaintiff in error.

Mr. Benjamin F. Butler, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

Langford, the plaintiff in error, who was plaintiff below, brought an action before a justice of the peace in the nature of forcible detainer, to recover of Charles E. Monteith the possession of buildings and grounds occupied by the latter under the agent of the United States for the Nez Percé Indians.

The plaintiff, in his petition, charges that under a lease from him the defendant entered with a condition to deliver possession to the plaintiff on ten days' notice, which was given.

The defendant answers by alleging that at the time of making the lease he was in possession under John B. Monteith, Indian agent; that he was induced to take the lease by the false representation of the plaintiff that he was the owner of the property; that said buildings and grounds were then and are now the property of the United States; and that the government had issued orders to defend its possession against the plaintiff.

Another allegation of the defence is that the property is situated within an Indian reservation, to which the Indian title has never been extinguished, and therefore forms no part of the Territory of Idaho. Of course, if this latter allegation be

true, neither the justice of the peace before whom the case was first tried, nor the District Court to which it afterwards came by appeal, had any jurisdiction over it. The opinion of this court in *Harkness* v. *Hyde* (98 U. S. 476) is relied on by the defendant.

The principle announced in that case is sound, namely, that when, by the act of Congress organizing a territorial government, lands are excepted out of the jurisdiction of the government thus brought into existence, they constitute no part of such Territory, although they are included within its boundaries. Congress, from which the power to exercise the new jurisdiction emanates, has undoubted authority to exclude therefrom any part of the soil of the United States, or of that whereto the Indians have the possessory title, when, by our solemn treaties with them, a stipulation to that effect has been made.

The applicability of this doctrine to the jurisdiction of places in which the United States have constructed permanent forts, arsenals, &c., before such governments are organized, will be seen at once. Congress has also acted on this principle on the admission of new States into the Union. The act for the admission of Kansas (12 Stat. 126), after describing its exterior boundaries, and declaring that the new State is admitted into the Union on an equal footing with the original States, in all respects whatever, adds, that nothing contained in the Constitution of the State shall be construed "to include any territory which by treaty with such Indian tribe is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries and constitute no part of the State of Kansas, until said tribe shall signify their assent to the President of the United States to be included within said State." Between the United States and the Shawnees a treaty then existed by which the United States guaranteed that their lands should never be brought within the bounds of any State or Territory, or subject to the laws thereof. In *United States* v. *Ward* (1 Woolw. 1), the Circuit Court held that the State courts had no jurisdiction in the lands of the Shawnees, and this was repeated in *United States* v. *Stahl*, id. 192.

The act of Congress of March 3, 1863, to provide a temporary government for the Territory of Idaho (12 Stat. 808), contains a clause precisely similar to that in the act admitting Kansas into the Union.

This court, in *Harkness* v. *Hyde* (*supra*), relying upon an imperfect extract found in the brief of counsel, inadvertently inferred that the treaty with the Shoshones, like that with the Shawnees, contains a clause excluding the lands of the tribe from territorial or State jurisdiction. In this it seems we were laboring under a mistake. Where no such clause or language equivalent to it is found in a treaty with Indians within the exterior limits of Idaho, the lands held by them are a part of the Territory and subject to its jurisdiction, so that process may run there, however the Indians themselves may be exempt from that jurisdiction. As there is no such treaty with the Nez Percé tribe, on whose reservation the premises in dispute are situated, and as this is a suit between white men, citizens of the United States, the justice of the peace had jurisdiction of the parties, if the subject-matter was one of which he could take cognizance.

Sect. 347 of the act to regulate proceedings in civil cases in the courts of that Territory declares that, on a trial before a justice of the peace, if it appear from the plaintiff's own showing, or from the answer of the defendant verified by his oath, that the determination of the action will necessarily involve the decision of a question of title to real property, the justice of the peace shall suspend all further proceedings, and certify the case to the District Court of the county, which shall thereafter have jurisdiction over the case as if originally brought in that court.

The record is imperfect, but it appears that an appeal was taken from the judgment of the justice of the peace to the District Court, and that the latter overruled the motion of the defendant to dismiss the case because the justice of the peace was without jurisdiction to try it. The same matter was urged in the Supreme Court on appeal from the judgment of the District Court.

We are of opinion that the justice of the peace had no jurisdiction to try the case after the sworn answer of the defendant

was filed, and that it was his duty to certify it for primary trial to the District Court. When removed there on appeal, it should have been dismissed, because there could have been no lawful trial before the justice.

That the issue tendered by the sworn answer of the defendant involved the title is clear. If he was holding under the United States, his attornment to the plaintiff and taking a lease were void. The question would then arise, whether the title of plaintiff or that of the United States, set up by defendant, was valid. For the trial of that title, the action brought by the plaintiff and the forum in which it was commenced were inappropriate. The judgment of the Supreme Court of Idaho on the effect of their own code of procedure in this respect will not be reversed here.

Judgment affirmed.

GRAHAM v. RAILROAD COMPANY.

1. Where a corporation, solvent at the time, and having no actual intent to defraud creditors, disposes of its lands for an inadequate consideration or by a voluntary conveyance, its subsequent creditors cannot question the transaction.
2. *Semble*, that where a corporation has waived, or omitted to exercise, the right to institute proceedings to recover lands of which it has been defrauded, such right does not inure to the benefit of subsequent creditors or purchasers.

APPEAL from the Circuit Court of the United States for the Eastern District of Wisconsin.

This is a bill in equity filed by Lawrence G. Graham and Donald D. Scott against the La Crosse and Milwaukee Railroad Company, the Milwaukee and St. Paul Railway Company, Moses Kneeland, James Ludington, Byron Kilbourn, and others, to subject certain real estate in the city of Milwaukee, Wisconsin, to the satisfaction of certain judgments recovered by the complainants against the first-named company for an indebtedness on contracts arising after its sale and conveyance of that real estate, to Charles D. Nash. The defendants deraign title through him.

The court below dismissed the bill, whereupon the complainants appealed here. The remaining facts are stated in the opinion of the court.

Mr. Matthew H. Carpenter and *Mr. Newton S. Murphey* for the appellants.

The complainants had the right, as subsequent creditors, to maintain this suit, because, first, if, as we contend, the sale was void as to Nash and purchasers from him with notice, then subsequent creditors of the company may treat the conveyance to him as never having been made; and, secondly, if such sale is merely voidable, it may, at the suit of such creditors, be set aside and the property subjected to the payment of their debts.

It is a general principle that a creditor may, in equity, reach every property right of his debtor. *Williams* v. *Thorn*, 70 N. Y. 270. Even damages recovered for torts to property which is subject to execution may be reached by a creditor's bill. *Hudson* v. *Plets*, 11 Paige (N. Y.), 183. A creditor purchasing the lands of his debtor on execution may bring his bill to set aside a prior usurious mortgage, or prosecute any suit in regard to them that the debtor could have maintained. *Dix* v. *Van Wyck*, 2 Hill (N. Y.), 525; *Shaw* v. *Dwight*, 27 N. Y. 245; *McMahon* v. *Allen*, 35 id. 403. A judgment creditor may, without issuing an execution, maintain a suit to remove a cloud upon the title to lands, whereon his judgment would otherwise be a lien. *Shaw* v. *Dwight*, *supra*.

Where A. is induced by fraud to convey lands to B. under circumstances which, in equity, entitle the former to set aside the sale, B. has thereunder no such adverse possession as will defeat a subsequent deed from A. to C., and the latter may maintain a bill to set aside the prior voidable conveyance. *Livingston* v. *Iron Company*, 9 Wend. (N. Y.) 511; *Dickinson* v. *Burrell*, Law Rep. 1 Eq. 337; *McMahon* v. *Allen*, *supra*; *Baker* v. *Whiting*, 3 Sumn. 475.

Crocker v. *Belangee et al.* (6 Wis. 645), and *Milwaukee & Minnesota Railroad Co.* v. *Milwaukee & Western Railroad Co.* (20 id. 174), relied upon by the appellees, rest upon *Prosser* v. *Edmonds* (1 Y. & C. 481), which was substantially overruled by *Dickinson* v. *Burrell*, *supra*. These cases are both consid-

ered, and *Dickinson* v. *Burrell* is followed in *McMahon* v. *Allen*, which is very like the present case. The conveyance was obtained by fraud, and in violation of the duty imposed by fiduciary relations. The grantor then made a general assignment for the benefit of creditors; and the assignee's bill to set aside the conveyance was sustained.

Again, *Prosser* v. *Edmonds* and the cases following it, even if held to be good law, do not apply to this case. They all proceed upon the ground that the second conveyance is void by reason of the first grantee's adverse possession of the lands. This cannot be said of a proceeding by a creditor seeking, as in the present case, to enforce the lien of his judgment on them.

The doctrine that subsequent creditors cannot set aside a debtor's fraudulent conveyance rests upon the ground that he was a party to the fraud, and, in furtherance of it, transferred the property. He cannot rescind the sale; and they find no property right in him which even he could assert against his grantee. Existing creditors only are protected by the statute in such a case. But where the conveyance was obtained by fraud practised upon him, he has a subsisting property right, and may enforce the rescission of the sale.

If the defrauded debtor company had sold the property for value to the complainants, or conveyed it to them in satisfaction of their judgment, they could, in either case, have brought their bill to set aside the prior conveyance to Nash. If so, they could levy on the property, and, having thus acquired a specific lien, maintain such a suit.

The distinction between prior and subsequent creditors is not to be held as strictly in the case of a corporation as in that of individual debtors.

In *Bradwell* v. *Weeks* (1 Johns. (N. Y.) Ch. 205), and in *Cumberland* v. *Codrington* (3 id. 229), approved in *Bank of the Metropolis* v. *Guttschlick* (14 Pet. 19), it was held that when a trust is created for the benefit of a third party, though without his knowledge at the time, he may ratify and enforce it. In *Railroad Company* v. *Howard* (7 Wall. 392), and numerous subsequent cases, it is held that the property of a corporation is a trust fund for creditors; and we think the court

meant all creditors becoming such during the life of the corporation. *Jackson* v. *Ludeling*, 21 id. 616.

Mr. Ephraim Mariner and *Mr. John W. Cary, contra.*

MR. JUSTICE BRADLEY delivered the opinion of the court.

In September, 1855, the La Crosse and Milwaukee Railroad Company not being at that time, so far as appears, indebted in any considerable amount, sold certain lands in the city of Milwaukee not then wanted for railroad purposes to Charles D. Nash for the sum of $25,000. The officers of the company who took a leading part in negotiating the sale are charged to have been interested in the purchase, and to have furnished Nash the means for effecting it. At all events, shortly after it was made, Nash conveyed the property, for the original consideration, to Moses Kneeland, one of the officers referred to, and Kneeland, retaining one third part, subsequently conveyed the other two third parts to Ludington and Kilbourn, they all being directors of the company, and members of the executive committee. The company itself never questioned the fairness of this transaction; on the contrary, the sale was subsequently (in March, 1858) expressly confirmed by the board of directors, and a further quitclaim deed executed by the company in confirmation thereof. In September and November, 1858, the appellants recovered two judgments against the company for indebtedness on contract, arising after the sale of the lands, and issued executions thereon, under which levies were made on said lands, as lands of the company. In January, 1860, the appellants, having sued on these judgments in the United States court, recovered a second judgment for upwards of $40,000, issued execution thereon, and made another levy on the lands. Being unwilling to attempt a sale under their said execution in consequence of the deeds for the lands being recorded, the appellants, in June, 1860, filed the bill in this case against Kneeland, Kilbourn, Ludington, and the railroad company, setting forth their said judgments, executions, and levies, stating the fact of the said sale to Nash and his conveyance to Kneeland, and the latter's conveyance to the other parties; alleging that the transaction was a fraud against the corporation and its creditors, and complaining that the said

conveyances of the lands were a cloud upon their right to sell the lands under execution, and an impediment in the way of the execution of their writ of *fieri facias;* and prayed that the lands might be decreed subject to the lien of their judgment; that they might be decreed to be authorized to sell the same, or so much as might be necessary for the purpose of satisfying their judgment; and that Kneeland, Kilbourn, and Ludington might join in the conveyance, and might be restrained from claiming the land; and that the conveyances to them might be declared null and void. The bill, amongst other things, averred that the lands were sold to Nash for much less than their real value; but it contained no allegation that the company was insolvent, or that it had not other assets available under an execution; nor was any offer made to repay the consideration which the purchaser had given for the lands.

To this bill the defendants severally filed answers, denying that the lands were worth more than $25,000 at the time of sale; averring that the sale was made in good faith, and with the company's concurrence, and setting forth in detail many circumstances tending to show that the title was involved and embarrassed; that they required large outlays of money to render them available; that the company had offered them for sale in the market, and was unable to get from any other person the price paid for them by Nash; that although Nash was requested to purchase the lands by Kneeland, and was aided by him in paying therefor, yet Nash had the option to keep them; but after making the purchase and inquiring into the title and situation of the lands, he asked to be relieved from the purchase, and that thereupon Kneeland, Kilbourn, and Ludington took them off of his hands.

The parties went into proofs, and it appears that the company had, for months prior to the sale, been endeavoring to dispose of the lands, and could get no purchaser at the price offered by Nash; and the leading statements of the answer, as to the title and situation of the lands, were verified. It also appeared that the railroad company never objected to the sale, but that it was expressly confirmed in March, 1858, by a resolution of the board of directors, as before noticed.

Various transactions subsequently took place, by which other

parties became interested in the lands, and in the affairs and property of the railroad company, which are fully developed in the supplemental proceedings and proofs; but it is unnecessary to notice them further. The foregoing statement exhibits the leading features of the case as presented for our consideration.

The main question is, whether the sale to Nash, made before the railroad company became indebted to the appellants, and when for all that appears it was perfectly solvent, even though made for the use and benefit of the officers referred to, can be set aside at the instance of the complainants, for the purpose of subjecting the lands to sale under their execution. And this question, we think, must be answered in the negative.

It is a well-settled rule of law that if an individual, being solvent at the time, without any actual intent to defraud creditors, disposes of property, for an inadequate consideration, or even makes a voluntary conveyance of it, subsequent creditors cannot question the transaction. They are not injured. They gave credit to the debtor in the status which he had after the voluntary conveyance was made.

The authorities on this subject are fully collected in the notes to *Sexton* v. *Wheaton* (1 Am. L. Cas. 1), and in the opinion of Mr. Chief Justice Marshall in that case; and the general doctrine is affirmed in *Mattingly* v. *Nye*, 8 Wall. 370.

It is true that if a debtor dispose of his property, with intent to defraud those to whom he expects to become immediately or soon indebted, this may be a fraud against them, which they may have a right to unravel. But that is a special case, to which the present bears no resemblance. It is not pretended that the railroad company disposed of the property in question for the purpose of defrauding creditors, much less for the purpose of defrauding those who afterwards in due course of business might become its creditors.

But it is contended that this is a case in which the debtor corporation was defrauded of its property, and that as the company had a right of proceeding for its recovery, any of its judgment and execution creditors have an equal right; that it is a property right, and one that inures to the benefit of creditors.

Conceding that creditors who were such when the fraudulent procurement of the debtor's property occurred, — and cases to that effect have been cited, — the question still remains, whether, the debtor being unwilling to disturb the transaction, subsequent creditors have such an interest that they can reach the property for the satisfaction of their debts. We doubt whether any case, going as far as this, can be found. No such case has been cited in the argument. Dicta of judges to that effect may undoubtedly be produced, but they are not supported by the facts of the cases under consideration.

It seems clear that subsequent creditors have no better right than subsequent purchasers, to question a previous transaction in which the debtor's property was obtained from him by fraud, which he has acquiesced in, and which he has manifested no desire to disturb. Yet, in such a case, subsequent purchasers have no such right. In *French* v. *Shotwell* (5 Johns. (N. Y.) Ch. 555), Chancellor Kent decided, upon full consideration, that when a party to a judgment, entered upon a warrant of attorney, voluntarily waives his defence or remedy on the ground of fraud or usury, and releases the other party, a subsequent purchaser under him, with notice of the judgment, will not be allowed to impeach it, or to investigate the merits of the original transaction between the original parties; and he dismissed a bill filed by the subsequent purchaser for relief in such a case. The Chancellor said: "If the party himself who is the victim of fraud or usury chooses to waive his remedy and release the party, it does not belong to a subsequent purchaser under him to recall and assume the remedy for him. If a judgment was fraudulent by collusion between the parties to it, on purpose to defraud a subsequent purchaser, the case would present a very different question. But if the judgment was fraudulent only as between the parties, it is for the injured party alone to apply the remedy. If he chooses to waive it and discharge the party, it cannot consist in justice or sound policy, that a subsequent voluntary purchaser, knowing of that judgment, should be competent to investigate the merits of the original transaction as between the original parties. *Quisque potest renunciare jure pro se introducto.* . . . It is stated to have been a principle of the common law that a fraud could only be

avoided by him who had a prior interest in the estate affected by the fraud, and not by him who subsequently to the fraud acquired an interest in the estate. *Upton* v. *Basset*, Cro. Eliz. 445, and recognized in 3 Co. 83 *a*."

This decision of Chancellor Kent was afterwards nearly unanimously affirmed by the Court of Errors. 20 Johns. (N. Y.) 668.

When the question of the right of a creditor to set aside a conveyance procured from the debtor by fraud first came before the courts in England, it was held that the debtor's own right was merely the right to file a bill in equity against the fraudulent grantee adversely; and, if he did not see fit to take such a proceeding, his creditor had no such privity with the transaction as to enable him to obtain relief, even though the debtor should assign his supposed right to the creditor; that the transaction savored of champerty, and was opposed, at least, to the spirit of the law against champerty and maintenance. This was the substance of the decision by the Court of Exchequer in 1835, in *Prosser* v. *Edmonds*, 1 Y. & C. 481. Lord Abinger treated the case as a new one, and at the close of the argument remarked that his impression was that such a claim could not be sustained in equity, unless the party who made the assignment joined in the prayer to set it aside. He afterwards gave a deliberate opinion upon the point. In that case, an executor and trustee had fraudulently procured an assignment of his brother-in-law's interest in the estate, knowing its value, which was unknown to the assignor. A subsequent creditor of the assignor, to whom he assigned his whole interest in the estate, filed a bill to set aside the assignment to the trustee. Lord Abinger distinguished the case from that of an assignment of a chose in action, as a note not negotiable, or a bond, or a mortgage, or an equity of redemption, where possession of the thing assigned is delivered to the assignee; and treated it as an assignment of a mere naked right to file a bill in equity, in which the last assignee purchased nothing but a hostile right to bring parties into a court of equity as defendants to a bill filed for the purpose of obtaining the fruits of his purchase. "What is this," says the Lord Chief Baron, "but the purchase of a mere right to recover? It is a rule, not of our law alone, but of that of all countries (Voet ad Pandect,

Lib. 41, tit. 1, sect. 88), that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated, and is against good policy. All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce. There are many cases where the acts charged may not amount properly to maintenance or champerty, yet of which, upon general principles, and by analogy to such acts, a court of equity will discourage the practice." "Robert Todd, when he assigned, was in possession of nothing but a mere naked right. He could obtain nothing without filing a bill. No case can be found which decides that such a right can be the subject of assignment, either at law or in equity." These remarks are very broad, and would apply to the case of existing as well as subsequent creditors; though the case itself was that of a subsequent creditor. It forms the subject of a section in Story's Commentaries on Equity (sect. 1040 *h*), where, in a note, Lord Abinger's opinion is extensively quoted; and it has been followed by other very respectable authorities, and, as applied to subsequent creditors, at least, we think that the reasoning is sound.

The principle established in *Prosser* v. *Edmonds* has been adopted by the Supreme Court of Wisconsin, in which State the lands in question are situated. In *Crocker* v. *Belangee et al.* (6 Wis. 645), decided in 1858, it was held that a deed obtained from the grantor, through fraudulent representations made by the grantee, is not void, but voidable only, at the election of the grantor: and that the conveyance of the same land by the grantor to another person is not the exercise of such election, and does not avoid the former deed; that, in order to avoid such former deed, some proceeding must be had by the grantor to which the grantee is a party; and that a subsequent purchaser from the grantor cannot set up the alleged fraud of the first grantee to defeat his title, — the court holding that the right of a vendor to avoid a sale or deed on the ground of fraud practised by the vendee is not a right or interest capable of sale and transfer, so as to enable a subsequent vendee of such right, for such cause, to attack the title

of the first vendee; that it is a mere personal right, incapable of sale or transfer.

In *Milwaukee & Minnesota Railroad Co.* v. *Milwaukee & Western Railroad Co.* (20 id. 174), the latter company had covenanted to pay a certain portion of an incumbrance on railroad property afterwards purchased by the complainant company under a subsequent mortgage. A release of the obligation had been fraudulently, as alleged, procured from the original mortgagor company owning the road. The complainant purchased under a mortgage which conveyed "all causes of action, demands, and choses in action, of whatever nature," of the mortgagors; and claimed to have purchased the right to set aside the alleged fraudulent release, and filed a bill for that purpose; but the bill was dismissed on the ground that such a right of action could not be thus assigned. The court say: "Admitting that the facts alleged present a case which would entitle the La Crosse and Milwaukee company [the mortgagor] to have the release set aside on account of these acts of fraudulent concealment by one of its directors of his interest in the defendant company, and assuming that the further fact appears that this right of action has been assigned by the La Crosse and Milwaukee company to the plaintiff, the question would then arise, whether the release could be avoided on the application of such plaintiff, the La Crosse and Milwaukee company making no complaint of the fraud whatever. In other words, is this mere right to litigate the question, and to set aside the deed of release on account of fraud practised upon the assignor, a subject of assignment and transfer, and will a court of equity allow the assignee to stand in the shoes of the assignor in respect to the remedies?" And then referring to the previous case of *Crocker* v. *Bellangee et al.*, and to *Prosser* v. *Edmonds*, the court expresses its approbation of those decisions, and adds: "A reference to these authorities is all which probably need be said at this time in regard to the allegations above cited [referring to the contention of counsel], and upon the point whether the plaintiff company could avoid the release for the alleged fraudulent act of concealment, even if this right of action had been assigned to it by the La Crosse and Milwaukee company"

It seems to us that those cases, which, so far as it appears, declare the settled law of Wisconsin, are conclusive of the present case.

It is contended on the part of the appellants that *Prosser* v. *Edmonds* has been overruled by the subsequent cases of *Dickinson* v. *Burrell* (Law Rep. 1 Eq. 337) and *McMahon* v. *Allen*, 35 N. Y. 403. We have examined these cases, and others which are supposed to be in conflict with *Prosser* v. *Edmonds*. In *Dickinson* v. *Burrell*, the Master of the Rolls, Lord Romilly, expressly disavows any intention to overrule the former case. He says: "The demurrer is mainly supported on the case of *Prosser* v. *Edmonds*, which was decided, after long deliberation, by Lord Abinger; but I am of opinion that the case before me does not fall within the rule established by that decision." The case then before the court was, that a conveyance of an interest in an estate had been fraudulently procured from Dickinson, by his own solicitor, to a third party for the solicitor's benefit, and for a very inadequate consideration. Dickinson, ascertaining the fraud, by a conveyance which recited the facts, and that he disputed the validity of the first conveyance, transferred all his share in the estate to trustees for the benefit of himself and his children. The trustees filed a bill to set aside the fraudulent conveyance upon repayment of the consideration-money and interest, and to establish the trust. The Master of the Rolls sustained the bill, observing: "The distinction is this: if James Dickinson had sold or conveyed the right to sue to set aside the indenture of December, 1860, without conveying the property, or his interest in the property, which is the subject of that indenture, that would not have enabled the grantee, A. B., to maintain this bill; but if A. B. had bought the whole interest of James Dickinson in the property, then it would. The right of suit is a right incidental to the property conveyed." "I think that the distinction between the conveyance of the property itself and the conveyance of a mere right to sue, or what in substance is a right to sue, is taken by Lord Abinger in the case of *Prosser* v. *Edmonds*. The distinction is also taken in *Cockell* v. *Taylor* (15 Beav. 103) and in *Anderson* v. *Radcliffe* (Ell., B. & E. 806), and has been adopted and approved in many other cases; and it is, I think, founded in reason and good sense."

Surely there is here no overruling of *Prosser* v. *Edmonds*, even if such overruling could avail against the Wisconsin decisions. It leaves that case in full force as to assignments of the mere right to sue. In the case before us there is not even that. The railroad corporation acquiesced in the sale, and confirmed it. The conveyance, which, perhaps, might have been set aside had the company seen fit, became absolute as between the parties and carried the title. It is as valid between the parties as if the corporation had conveyed to a stranger. The appellant then becomes a creditor, and afterwards obtains judgment, and simply makes a levy; and then comes into court and asks its aid to remove a cloud from its title. What title? Has he acquired any title? Was there any title for him to acquire? There had been a right to file a bill in equity, and that right had been remitted by the company's acquiescence in the sale,—probably for the reason that it obtained all that the property was worth at the time. The contrary, at least, is not established. And if it were established, it would only make out a case of voluntary conveyance as against a subsequent creditor, which has already been considered. We think that there is nothing in the case of *Dickinson* v. *Burrell* to overrule the effect of *Prosser* v. *Edmonds*, so far as the present case is concerned.

Then, as to *McMahon* v. *Allen* (35 N. Y. 403), decided in 1866. One Harrison, in March, 1852, being in debt, was induced by the fraudulent contrivance of his agent and attorney, and to the prejudice of his creditors, to convey to said agent, for a very inadequate consideration, his interest in his mother's estate and in certain other property, he being ignorant of the fraud practised upon him. In August, 1852, Harrison made a general assignment for the benefit of his creditors of all his property and rights of action, with full power to sue for and collect the same. The assignee filed a bill to set aside the conveyance to the agent. The bill was sustained. The court, Mr. Justice Hunt delivering the opin ion, relied on *Dickinson* v. *Burrell*, saying: "In the recent case of *Dickinson* v. *Burrell*, this precise question was presented;" and, after quoting largely from the opinion in that case, added: "This was a well-considered case, is of high authority, and, in

my opinion, is an accurate exposition of the law. I think it should control the present case." In the New York case, it is true, there was no express repudiation of the fraudulent conveyance, as in *Dickinson* v. *Burrell*, but there was a conveyance of the estate to the assignee, with a power to sue for the benefit of creditors; and those creditors had been directly defrauded. Without further comment, it seems to us clear that *McMahon* v. *Allen* cannot control the present case.

The principle that subsequent creditors cannot question a voluntary or fraudulent disposition of property by their debtor, not intended as a fraud against them, is especially applicable in cases of constructive fraud, like that charged in the present bill. Suppose it be true that the purchase of the lands in question by or for the benefit of officers of the company actively concerned in the transaction could be set aside at the instance of the company as a constructive fraud, yet if there was no actual fraud, if the company received full consideration for the property sold, how can it be said that subsequent creditors of the company are injured?

In the present case we are satisfied from the evidence that the property was sold for its fair value at the time, and that no actual loss accrued to the railroad company's estate.

It would be unjust and a great hardship, therefore, on the mere ground of the constructive fraud, to allow creditors who had no interest at the time to seize and dispose of the property sold.

It is contended, however, by the appellant that a corporation debtor does not stand on the same footing as an individual debtor; that, whilst the latter has supreme dominion over his own property, a corporation is a mere trustee, holding its property for the benefit of its stockholders and creditors; and that if it fail to pursue its rights against third persons, whether arising out of fraud or otherwise, it is a breach of trust, and creditors may come into equity to compel an enforcement of the corporate duty. This, as we understand, is the substance of the position taken.

We do not concur in this view. It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity.

Its affairs are necessarily managed by officers and agents, it is true; but, in law, it is as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same. Its stockholders may call the officers to account, and may prevent any malversation of funds, or fraudulent disposal of property on their part. But that is done in the exercise of their corporate rights, not adverse to the corporate interests, but coincident with them.

When a corporation becomes insolvent, it is so far civilly dead, that its property may be administered as a trust-fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust-funds, which, in other circumstances, are as much the absolute property of the corporation, as any man's property is his. We see no reason why the disposal by a corporation of any of its property should be questioned by subsequent creditors of the corporation, any more than a like disposal by an individual of his property should be so. The same principles of law apply to each.

We think that the present bill cannot be maintained.

Decree affirmed.

SEWARD v. CORNEAU.

A bond is not sufficient for the purposes of either an appeal to this court or a *supersedeas*, if the obligors are not thereby bound for the payment of costs should the appellant fail to make his plea good.

MOTION to dismiss an appeal from the Circuit Court of the United States for the District of Louisiana.

This suit, brought in a State court of Louisiana, to enjoin a proceeding known as an order of seizure and sale, was, on the petition of the complainants, removed to the Circuit Court, where, on a final hearing, their bill was dismissed. From the decree they prayed for an appeal, which was allowed, with an

order that it should "operate as a *supersedeas* and stay of execution until the final decree of the Supreme Court should be rendered therein, on the complainants giving bond in the sum of $1,000."

The bond given was approved by the district judge. It is subject to the condition that we, the appellants, "will well and truly pay to the said defendants in said appeal and suit all such damages as they may recover against us in case it should be decided that the said appeal was wrongfully obtained."

The appellees now move to dismiss the appeal, upon the ground that the bond does not conform to the requirements of the statute or to the twenty-ninth rule of this court.

Mr. Edwin T. Merrick and *Mr. George W. Race* in support of the motion.

Mr. John D. McPherson and *Mr. Calderon Carlisle, contra.*

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The bond in this case is insufficient in form either for the purposes of a *supersedeas* or an appeal, inasmuch as it contains no security for costs. This, however, does not necessarily avoid the appeal; but we may impose such terms on the appellants for the omission as, under the circumstances, shall seem to be proper. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304; *Davidson* v. *Lanier*, 4 Wall. 447. The appeal will, therefore, be dismissed, unless the appellants, on or before the first Monday in January next, give bond, with good and sufficient security, in due form of law, to prosecute their appeal to effect, and to answer all damages and costs if they fail to make their plea good; the bond to be in the penal sum of $1,000, and the security taken and approved by the justice of this court assigned to the fifth circuit; and it is

So ordered.

POTTER v. NATIONAL BANK.

In an action against an executor in his representative capacity, A., who was interested in the issue but not a party thereto, was, against the objection of the defendant, introduced as a witness by the plaintiff, and permitted to testify to statements of the testator touching the subject-matter in controversy. *Held*, that the witness was competent and the evidence admissible.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The facts are stated in the opinion of the court.

Mr. George Willard for the plaintiff in error.

Mr. Huntington W. Jackson and *Mr. John H. Thompson*, *contra.*

MR. JUSTICE HARLAN delivered the opinion of the court.

This is a writ of error from a judgment rendered in the Circuit Court of the United States for the Northern District of Illinois in favor of the Third National Bank of Chicago, Illinois, against Orrin W. Potter, executor of E. B. Ward. Upon the trial before the jury, one William Sturgess, not a party to the action, was introduced as a witness in behalf of the bank. In the course of his examination he was allowed, against the objection of the defendant, to testify as to a conversation had by him with Ward, touching some of the matters involved in the present controversy. The objection to his testifying was placed upon the ground that Ward was dead, and that he, the witness, was interested in the issues to be tried. The action of the Circuit Court in permitting the witness to disclose that conversation is the subject of one of the assignments of error.

By sect. 858 of the Revised Statutes it is declared that "in the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: *Provided*, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator,

intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law and in equity and admiralty."

The first clause of this section is, substantially, in the words of the proviso of the third section of the act of July 2, 1864, making appropriations for sundry civil expenses of the government. 13 Stat. 351. The second clause is in the words of the proviso of the act of March 3, 1865, amending the third section of the act of July 2, 1864 (id. 533), while the last clause is founded upon the act of July 16, 1862. 12 id. 588.

The existing statute (Rev. Stat., sect. 858) seems too plain to require construction. The first clause of that section shows that there was in the mind of Congress two classes of witnesses, — those who were parties to the issue, that is, parties to the record; and those interested in the issue to be tried, that is, those who, although not parties to the record, held such relations to the issue that they would lose or gain by the direct legal operation and effect of the judgment. A witness may be interested in the issue without being a party thereto, — a distinction which seems to have been recognized in all the statutes to which reference has been made. But whether a party to or only interested in the issue, the witness is not to be excluded in the courts of the United States, upon either ground, except that in actions in which judgment may be rendered for or against an executor, administrator, or guardian, no party to the action can testify against the other as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. The proviso of sect. 858 excludes only one of the classes described in its first clause, — those who are, technically, parties to the issue to be tried, — and we are not at liberty to suppose that Congress intended the word "party," as used in that proviso, to include both those who, according to the established rules of pleading and evidence, are parties to the issue, and those who, not being parties, have an interest in the result of that issue

It is, however, contended by the learned counsel for the plaintiff in error that, by the laws of Illinois, Sturgess was an incompetent witness as to the matters embraced in his conversation with Ward, and that the Circuit Court was bound to follow those laws as interpreted by the highest court of the State. It is quite true that the thirty-fourth section of the Judiciary Act of 1789 — preserved, *totidem verbis*, in sect. 721 of the present revision of the statutes — has been construed as requiring the Federal courts, in all civil cases at common law, not within the exceptions named, to observe, as rules of decision, the rules of evidence prescribed by the laws of the States in which such courts respectively sit. *Vance* v. *Campbell*, 1 Black, 427; *Wright* v. *Bales*, 2 id. 535; *McNiel* v. *Holbrook*, 12 Pet. 84; *Sims* v. *Hundley*, 6 How. 1; *Ryan* v. *Brindley*, 1 Wall. 66. But that section of the act of 1789, as does sect. 721 of the Revised Statutes, expressly excepts from its operations cases "where the Constitution, treaties, or statutes of the United States otherwise provide." We have seen that the existing statutes of the United States do "otherwise provide," in that they forbid the exclusion of a witness upon the ground that he is a party to, or interested in, the issue, in any civil action whatever pending in a Federal court, except in a certain class of actions, which do not embrace the one now before us. "In all other respects," that is, in all cases not provided for by the statutes of the United States, the laws of the State, in which the Federal court sits, constitute rules of decision as to the competency of witnesses in all actions at common law, in equity, or in admiralty. It is clear, therefore, that the laws of Illinois can have no bearing upon a case which, as here, is embraced, or has been provided for, by the Federal statute.

But little need be said concerning the remaining assignments of error. The one which relates to the action of the court in permitting the bank to show that, in due course of its business, notices of protest would have been forwarded by mail to Ward, had they been received from the notary, would have deserved consideration, but for the fact, which appears from the bill of exceptions, that the jury were informed by the court, in its charge, that if the liability of Ward, as indorser, depended

solely upon this point, they would be instructed that the proof of such notice was insufficient. We cannot see, therefore, that this evidence, even if improperly admitted, injuriously affected the plaintiff in error.

The objection to the admission in evidence of the letter of Parsons, cashier, to Smith, dated Dec. 11, 1873, was properly overruled. No objection was made by plaintiff in error to the admission of the letters and telegrams of prior dates. The particular letter, to the reading of which objection was interposed, constituted a part of the transactions described in the letters and telegrams of previous dates, and was properly admitted, in further explanation of those transactions.

The only other assignments of error, of sufficient importance to require notice, relate to those parts of the charge to the jury to which exception was taken by the plaintiff in error. In each sentence or paragraph of the charge, to which exception was especially taken, the court informed the jury that the evidence tended to show certain facts which are detailed in the charge. The point is made here that the evidence did not tend to show any such state of facts as the charge of the court implied. But counsel overlook, or fail to give proper force to, the circumstance that the bill of exceptions, not purporting to contain all the evidence adduced before the jury, itself states that there was evidence tending to show the facts set forth in the charge. If, upon the whole evidence, the plaintiff in error was entitled to a peremptory instruction in his behalf, and the court had refused, when asked, to give such an instruction, its action could not be reviewed here, except upon a bill of exceptions, containing all the evidence. And so, if there was no evidence, or not sufficient evidence, tending to show the facts recited in the charge. If he desired the court to give any particular propositions of law to the jury, so much of the evidence as is necessary to show their pertinency ought to be set forth in the bill of exceptions. But no propositions of law were submitted by him to the court to be given to the jury. We do not perceive that the charge is in conflict with the evidence, so far as it is detailed in the bill of exceptions.

Under all the circumstances, this court must assume that there was evidence tending to show the facts set out in the

charge to the jury. And so construing the bill of exceptions, we do not perceive that any error of law was committed, and the judgment is, therefore,

Affirmed.

MINING COMPANY *v.* CONSOLIDATED MINING COMPANY.

1. The grant of the sixteenth and thirty-sixth sections of public land to the State of California for school purposes, made by the act of March 3, 1853 (10 Stat. 246), was not intended to cover mineral lands. Such lands were, by the settled policy of the general government, excluded from all grants.
2. A settlement within the meaning of sect. 7 of that act is not required, either in regard to the acts to be done or the qualifications of the settler, to be precisely the same as that whereby a pre-emption right can be secured under the act of Sept. 4, 1841. 5 Stat. 453.
3. Whenever, at the time the government surveys of section 16 or 36 of public land in California are made, there is, by the erection of a dwelling-house or by cultivation, a settlement on any portion thereof, whereon some one resides who asserts claim thereto, the title to such portion does not vest in the State, but she has the right to other land in lieu thereof. *Sherman* v. *Buick* (93 U. S. 209) and *Water & Mining Company* v. *Bugbey* (96 id. 165) commented on and explained.

ERROR to the Circuit Court of the United States for the District of California.

The facts are stated in the opinion of the court.

Mr. Peter Van Clief and *Mr. Oliver D. Barrett* for the plaintiff in error; *Mr. Samuel M. Wilson* and *Mr. George A. Nourse* for the defendant in error; *Mr. Benjamin F. Butler* for the State of California; and *The Attorney-General* for the United States.

MR. JUSTICE MILLER delivered the opinion of the court.

The action in this case was brought originally in the State court of California by Daniel W. Gillette against the Keystone Consolidated Mining Company, the present defendant in error, to recover possession of the east half of section 36, in township 7 north, range 10 east of Mount Diablo meridian, and in the progress of the case it was transferred to the Circuit Court of

the United States, where judgment was rendered in favor of the defendant. The Ivanhoe Mining Company, the plaintiff in error, having been substituted for Gillette, as his successor in interest, a jury was waived by the parties, and the case submitted to the court.

The plaintiff asserted title to the land in controversy under a patent from the State of California, and the defendant under patents from the United States. The title of California rests upon the act of Congress granting that State the sixteenth and thirty-sixth sections of every township for school purposes, and that of defendant on the acts of Congress concerning the possession and sale of the mineral lands.

As the question to be decided necessarily involves the title to much other mineral land in California, in which the authorities of the State of California and the officers of the Land Department of the United States entertain and act upon conflicting views of the rights of the State and the general government, the State of California by her counsel, and the United States by the Attorney-General, have been permitted to take part in the argument.

The defendant only claims part of the land embraced in plaintiff's patent, and denies possession of that for which no title is asserted; and, as no possession is proved beyond that for which the defendant defends, only that is in controversy.

The court below finds that this is mineral land, and that the patent of the United States was issued to defendant for three several mining claims; to wit, the Spring Hill, the Geneva, and the Keystone. That the Spring Hill was located in May, 1851, the Keystone in 1853, and the Geneva in October, 1863; and that the original locators of said claims and their grantees have held undisturbed possession thereof ever since, and by such possession and the working of said mines the possessory title was vested in defendant at the time it filed its application for said patent in the land-office of the United States at Sacramento, Jan. 6, 1871, unless the State of California had acquired title to section 36 by grant from the United States. It also appears that on the land thus claimed by plaintiff a mining town, called Amador City, exists, of about four hundred or five hundred people, which began in 1850, and reached the

number mentioned in 1853, with many dwelling-houses, and some forty acres cultivated by the owners of the Keystone mining claim.

On the 18th of June, 1870, one Henry Casey applied to the State authorities to purchase the half-section of land on which this town and these mining claims were located, and a State patent was issued to his vendee, Gillette, Oct. 3, 1872.

The township in which this land lies was surveyed in the field in March, 1870, the survey approved Sept. 3, 1870, and the plat filed in the United States land-office at Sacramento, Oct. 7, 1870. Within three months after this latter date the application of the defendant was made for patents for the three mining claims, and the patents were issued July 14, 1873.

The right to these patents, and the claim of the town of Amador City, were contested before the register and receiver, the Commissioner of the General Land-Office, and the Secretary of the Interior, by the State of California, and the parties claiming under her, and the decision was adverse to the title of the State.

The question, and the only question, presented for our consideration is very sharply presented by this statement of facts and by the acts of Congress pertinent to the subject; and it is, whether under these acts the title of the land in question became fixed and vested absolutely in the State of California on the ascertainment by the survey of 1870 that it was part of the thirty-sixth section of the township in which it lies.

The act of March 3, 1853 (10 Stat. 244), under which the right of the State of California to the school lands arises, has been the subject of construction in this court more than once heretofore, and the decision of the question before us requires a further critical examination of its provisions. The first five sections of it provide for the establishment of the offices of surveyor-general, two land-offices, with registers and receivers, and for the organization of the general land system of the United States, including surveys; and it then proceeds to lay down the rules by which rights to the public lands may be acquired. The granting clause of the sixteenth and thirty-sixth sections of the public lands as thus surveyed, to the State of California, is as follows: —

"SECT. 6. And be it further enacted, that all the public lands in the State of California, whether surveyed or unsurveyed, with the exceptions of sections sixteen and thirty-six, which shall be, and hereby are, granted to the State for the purposes of public schools in each township, and with the exception of lands appropriated under the authority of this act, or reserved by competent authority, and excepting, also, the lands claimed under any foreign grant or title, and the mineral lands, shall be subject to the pre-emption laws of fourth September, eighteen hundred and forty-one, with all the exceptions, conditions, and limitations therein, except as is herein otherwise provided; and shall, after the plats thereof are returned to the office of the register, be offered for sale, after six months' public notice in the State of the time and place of sale, under the laws, rules, and regulations now governing such sales, or such as may be hereafter prescribed."

Sect. 7 of the act may as well be read here, as it is important to a true solution of the question under consideration.

"SECT. 7. And be it further enacted, that where any settlement, by the erection of a dwelling-house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other lands shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the act of Congress approved on the twentieth of May, eighteen hundred and twenty-six, entitled 'An Act to appropriate lands for the support of schools in certain townships and fractional townships, not before provided for,' and which shall be subject to approval by the Secretary of the Interior. And no person shall make a settlement or location upon any tract or parcel of land selected for a military post, or within one mile of such post, or on any other lands reserved by competent authority; nor shall any person obtain the benefits of this act by a settlement or location on mineral lands."

The twelfth section grants to the State seventy-two sections for the use of a seminary of learning, to be selected by the governor or some one appointed by him, in legal subdivisions of not less than a quarter-section, of any unsold, unoccupied, and unappropriated public lands: "*Provided, however*, that no mineral lands, or lands reserved for any public purpose what-

ever, or lands to which any settler may be entitled under the provisions of this act, shall be subject to such selection."

The thirteenth section also grants the State ten sections of land for the purpose of erecting the public buildings of the State, with the same proviso as the one to sect. 12.

The proviso to the third section is also relied upon as indicative of the purpose of Congress in regard to the mineral lands of California. That section contains the authority under which the surveyor-general is to act in surveying the public lands in that State, and after investing him with the powers conferred on other surveyors-general, and prescribing some specific directions for the survey of private land-claims, it is "*Provided*, that none other than township lines shall be surveyed where the lands are mineral, or are deemed unfit for cultivation; and no allowance shall be made for such lines as are not actually run and marked in the field, and were actually necessary to be run."

It is strongly urged by plaintiff's counsel that the language of the granting clause imports a grant *in præsenti*, and that wherever by any survey of the government thereafter made the location of the sixteenth and thirty-sixth sections of a township is ascertained, it establishes the title in the State from the date of the statute, namely, March 3, 1853.

It is quite unnecessary to enter upon this question, which has been before us in so many shapes; for, if it be conceded that such would be the effect of the statute if there were no words of exception in the grant, Congress has, in nearly every case where the question has arisen, made such specific exceptions to the operation of the grant as to decide the matter without resort to the rule of construction asserted by plaintiffs.

Take, for instance, railroad grants. Besides the more general reservations from the grant, there is almost always found a provision that where, by the location of the road, the sections on each side of it, which would pass by the general terms of the grant, are ascertained, those which have been pre-empted, sold, or otherwise disposed of shall not so pass, but the grantee may select other lands in lieu of those, which may be said in this manner to be excepted out of the grant.

This is true of the statute under consideration, and we may

pass this branch of the argument by conceding that if the land in controversy is subject to the grant the title relates to the date of the act of Congress.

Defendants allege that it is not so subject to the grant, for two reasons: —

1. That it is mineral land, and that the grant of school lands to the State does not cover any mineral land.

2. That by virtue of the seventh section such settlement and cultivation had been made on the land before the survey was made, as to take it out of the grant, and remit the State to the selection of other public land in lieu of this.

We will consider these in their order.

Very soon after the conquest of California and its cession to the United States by Mexico, it was found to be rich in the precious metals, and such was the rapid influx of immigrants from the Eastern States that the California population at the time it was organized as a State in 1850 was largely composed of mining camps and settlements engaged in mining these metals. As nearly all those mines were discovered on land the title of which was vested by the treaty in the government of the United States, it became important to determine what course the government would take with regard to this new source of untold wealth. The Spanish government, to which this territory and much other, rich in precious metals, had once belonged, had instituted a system of laws concerning her mines by which private enterprise was invited to develop them, and a revenue secured at the same time to the crown, which made Spain for a time the richest of the civilized governments of the world This system Mexico had inherited and perpetuated, and there were many American statesmen who believed that with the territory we had acquired the laws which governed the production of gold from the earth. Others believed that, whether this were so or not, it would be a wise policy for the government to secure to itself a fair proportion of the metal produced from its own ground. But, while Congress delayed and hesitated to act, the swarm of enterprising and industrious citizens filled the country, and, before a State could be organized, had become its dominating element, with wealth and numbers and claims which demanded consideration.

Matters remained in this condition, with slight exception, until July 26, 1866, when Congress passed a law by which title to mineral land might be acquired from the government at nominal prices, and by which the idea of a royalty on the product of the mines was for ever relinquished. 14 Stat. 251.

During this period, however, from 1849 to 1866, the system of the disposition of the public lands in general had to be introduced into California, and grants of land were made to the State for various purposes, also to railroad companies; and in all this the attention of Congress was necessarily turned to the distinction between mineral lands and the ordinary agricultural lands of the other Western States to which similar laws had applied. This distinction is nowhere more plainly manifested than in this act of 1853. As we said in *Sherman* v. *Buick* (93 U. S. 209), the main purpose of that act was to provide for the survey and sale of the public lands and for the right of pre-emption to the settler on them, and there was embraced in this clause of pre-emption the grant of the sixteenth and thirty-sixth sections to the State for school purposes. In the very sentence which contains this grant in parenthesis, and while introducing the new principle, that the public lands should be subject to the right of pre-emption, whether surveyed or unsurveyed, the mineral lands are excepted, in express terms, from this right and from public sale.

We say that this introduced a new principle in pre-emption law; for, except in a very few cases, no right of pre-emption had before existed until the lands were surveyed, so that the pre-emptor could designate by the description of the congressional survey the precise land to which his pre-emption attached.

But this right of pre-emption, on unsurveyed lands, was by this statute to last but one year; and so careful was Congress to protect mineral lands from sale and pre-emption, that, as we have already shown by the proviso to sect. 3 of the act, the surveyors were forbidden to extend their surveys over them.

The effect of this was as Congress intended it should be, that, as no surveys could be made of mineral lands until further order of Congress, there could be no sale, pre-emption, or other

title acquired in mineral lands until Congress had provided by law for their disposition. The purpose of these provisions was undoubtedly to reserve these lands, so much more valuable than ordinary public lands, and the nature of which suggested a policy different from other lands in their disposal, for such measures in this respect as the more matured wisdom of that body, which by the Constitution is authorized to dispose of the territory or other property of the United States, should after wards devise.

It is a strong corroboration of this view that Congress, in sect. 12 of this same statute giving the State seventy-two sections for a seminary of learning, declares that no mineral lands shall be taken under the grant, and makes the same reservation of its mineral lands in the grant for the erection of public buildings in the State.

We find a similar provision in the grant to the Pacific Railroad Companies, whose road it was known would pass through some of these mineral regions. By the fourth section of the act of 1864 (13 Stat. 356), it is declared that neither that act nor the act of 1862 shall be held to include in the grant "any government reservation or mineral lands or the improvements of any *bona fide* settler on any lands returned or denominated as mineral lands."

As we have already said, Congress, after keeping this matter in abeyance about sixteen years, enacted in 1866 a complete system for the sale and other regulation of its mineral lands, so totally different from that which governs other public lands as to show that it could never have been intended to submit them to the ordinary laws for disposing of the territory of the United States.

Taking into consideration what is well known to have been the hesitation and difficulty in the minds of Congressmen in dealing with these mineral lands, the manner in which the question was suddenly forced upon them, the uniform reservation of them from survey, from sale, from pre-emption, and above all from grants, whether for railroads, public buildings, or other purposes, and looking to the fact that from all the grants made in this act they are reserved, one of which is for school purposes besides the sixteenth and thirty-sixth sections,

we are forced to the conclusion that Congress did not intend to depart from its uniform policy in this respect in the grant of those sections to the State.

It follows from the finding of the court and the undisputed facts of the case, that the land in controversy being mineral land, and well known to be so when the surveys of it were made, did not pass to the State under the school-section grant.

It seems equally clear to us that the land is excepted from the grant by the terms of the seventh section of the act of 1853.

In the case of *Sherman* v. *Buick* (*supra*) we have said in reference to this section that it was unnecessary to decide whether the improvements found on the land when the survey was made and the character of the person owning them should be in all respects those which are prescribed by the general pre-emption law. We are now satisfied that this section prescribes its own rules on that subject, and that whenever, at the time these sections are ascertained by the government survey, there is either a dwelling-house or the cultivation of any portion of the land, on which some one is residing and is asserting claim to it, the title of the State does not vest, but the alternative right to other land as indemnity does. It is only necessary to look to what we have said in *Sherman* v. *Buick*, of the fact that Congress had in view the rapid settlement of the country and the long time which might elapse before it could be known by actual survey where these school sections would be found, to see that a liberal construction must be given to the language by which Congress expresses its purpose to protect these settlements, buildings, and cultivations, and that we have no right to add other qualifying incidents to the exercise of this right than those found in the statute. These are not the same required under the general pre-emption law, and we have no authority to import the latter into the new statute.

Some of the expressions found in *Sherman* v. *Buick* and in *Water & Mining Company* v. *Bugbey* (96 U. S. 165) are supposed by counsel to convey a different meaning; but in the use of the words "pre-emption" and "pre-emptor," in reference to *this section of the statute*, it was not designed to imply all that was meant by those terms in the act of 1841 and its amenda-

tory adjuncts, but to convey the idea of a settlement and a settler according to the terms of the statute under consideration. Nor is there anything in the principle announced in the latter case, that where a settler abandons his claim to hold the land against the State by virtue of such settlement or improvement, and acknowledges the title of the State by purchase, that his improvement or settlement cannot be set up by a third person to defeat the title of the State recognized by the United States, which conflicts with what we have just said or with the defendants' rights in the present case. Here the settlement, building, and cultivation have been continuous for twenty years, with constant assertion of claim. The same parties or their privies are still claiming it. None of them have accepted title under the State, or acknowledged its right to the land. The government of the United States has given them a patent founded on this very possession, use, and occupation. Nothing in that opinion justifies the construction placed upon it by counsel, and the case is clearly inapplicable to the one before us.

We are of opinion that the settlement, building, and cultivation found as facts by the Circuit Court bring the case within the provisions of the seventh section of the act of 1853, and necessarily render void the title asserted under the State by plaintiff.

It follows that the judgment of the Circuit Court is right, and it is accordingly

Affirmed.

MR. JUSTICE FIELD did not take any part in deciding this case.

JIFKINS v. SWEETZER.

1. Where the Supreme Court of a State reversed, on appeal, a decree dismissing, upon a final hearing, the complainant's bill, and remanded the cause with instructions to refer it to a master to state the accounts between the parties in accordance with the mandate, the suit cannot be removed to the Circuit Court of the United States.
2. *Removal Cases* (100 U. S. 457) cited and approved.

APPEAL from the Circuit Court of the United States for the Western District of Pennsylvania.

The facts are stated in the opinion of the court.

Mr. F. Carroll Brewster for the appellants.

Mr. A. Ricketts, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This was a suit in equity, begun in the Court of Common Pleas of Luzerne County, Pennsylvania, June 20, 1868, by the appellee against the appellants and one James Jifkins, to obtain an account of the rents and profits and a reconveyance of certain real estate, which, it was alleged, had been transferred to the defendants, and put into their possession as security for the payment of money. The defendants answered, denying that they held the property as security, and claiming that their title was absolute. Upon this issue testimony was taken, and after hearing in the Common Pleas, on the 20th of February, 1871, the prayer for relief was refused and the bill dismissed. From this decree an appeal was taken to the Supreme Court of the State, where, on the 23d of May, 1872, the decree below was reversed, the bill reinstated, and the cause remanded with instructions to refer the cause to a master "to take an account of the rents, issues, and profits received by the defendants from the property in question, together with an account of debts paid by them, due by the plaintiff, with an equitable allowance for services rendered by the defendants, ascertaining the amount due by either party to the other party, so as to enable the Court of Common Pleas to make a final decree in the premises, according to equity." On the 24th of August

the case was referred by the Common Pleas, in accordance with the mandate of the Supreme Court. On the 24th of August, 1874, two years later, but before any report was filed, the present appellants, who were then the sole defendants, James Jifkins having before that time died, filed, in the Common Pleas, a petition for the removal of the suit to the Circuit Court of the United States for the Western District of Pennsylvania, under the provisions of the act of 1866, now sect. 639, sub. 2, Rev. Stat. In this petition they averred that they had become citizens of the State of Virginia since the commencement of the suit; that the plaintiff was, when the suit was begun, and still continued to be, a citizen of Pennsylvania; and that the suit was one in which there could be a final determination of the controversy, so far as it concerned the petitioners, without the presence of the other defendant or his legal representatives as parties to the cause. On the 9th of November, 1874, the same parties filed a further petition for removal, under the act of 1867 (Rev. Stat., sect. 639, sub. 3), on the ground of local influence and prejudice. Both these petitions were denied in the State court, Nov. 16, 1874; but, notwithstanding this, the appellants, on the 5th of December, filed in the Circuit Court a certified copy of the record in the case, and, on the 20th of March, that court declined to take jurisdiction, and remanded the cause to the Court of Common Pleas. From that order the present appeal was taken, May 11, 1875, under the act of March 3, 1875, sect. 5. 18 Stat. 472.

The single question to which our attention was called on the argument was whether the petitions for removal were presented to the State court in time. In both the acts of Congress invoked it is provided that the petition shall be filed "before the trial or final hearing of the suit." From the record it appears that there was but a single issue between the parties; to wit, whether the appellants were the absolute owners of the property in dispute, or whether they held the title in trust for the appellee. This issue was heard and decided in favor of the appellants in the Common Pleas. The suit was then taken by appeal to the Supreme Court of the State, where it was again heard and a decision rendered in favor of the present appellee. This disposed of the case finally on its merits, and

nothing remained to be done but to continue the hearing already begun until the necessary accounts could be taken and the details of a final decree settled. The act of 1875 requires that the petition for removal shall be filed "before the trial." This, we held in the *Removal Cases* (100 U. S. 457), meant "before the trial is in good faith entered upon." If the "trial had actually begun and was in progress in the orderly course of proceeding," when the petition was presented, it would be too late. The same rule applies to the acts now under consideration. "Before the trial or final hearing" means here, as there, before the trial or hearing of the cause has been in good faith begun. These statutes do not, any more than that of 1875, "allow a party to experiment on his case in the State court, and, if he meets with unexpected difficulties, stop the proceedings and take his suit to another tribunal." He must make his election before he goes to the trial or hearing on the merits.

It seems to us clear that if the Court of Common Pleas had, in the first instance, decided the issue raised by the pleadings in favor of the appellee instead of the appellants, and sent the case to a master to state the accounts, no removal could have been effected after that. The final hearing was entered on when, in the orderly course of proceedings, the issue made by the pleadings, and on which the rights of the parties depended, was submitted to the court for judicial determination. It matters not that, after the main question in the case had been settled, the convenience of the court made it necessary to call in the help of a master. In this way no new hearing was entered on. The old submission was only continued until the details of the original inquiry could be settled for the purposes of a final decree.

The hearing of this case, originally begun in the Common Pleas, was transferred by the appeal to the Supreme Court. That court, on the appeal, had the right to re-examine what had been done in the Common Pleas. In effect it took up the case on the hearing begun below. If, on the appeal, the decree below had been reversed and the cause sent back for a rehearing, then the final hearing, for the purposes of the statutes now under consideration, would not have begun until the

court below had again entered upon the determination of the cause. Then the reversal would have perfected the right to a second hearing in the court of original jurisdiction, and, under the rule stated in *Vannevar* v. *Bryant* (21 Wall. 41), a demand for the transfer might properly be made. Here, however, the Supreme Court granted no new hearing. It reversed what had been done below, and then proceeded, under the original submission, to decree on the merits. It thus continued the hearing under the original submission, decided the controversy so far as the primary rights of the parties were concerned, and through the Common Pleas sent the case to a master to settle the details of the final decree. No power was given the court below to rehear the case, but only to proceed in due course with the hearing that had been begun until the inquiry as to the whole subject-matter was completed.

Decree affirmed.

MR. JUSTICE STRONG did not take part in the decision of this cause.

RAILWAY COMPANY *v.* RENWICK.

The second section of the act of the General Assembly of Iowa, entitled "An Act in relation to riparian owners on the Mississippi and Missouri Rivers," approved March 18, 1874, is not in conflict with any statute of the United States. Where, therefore, the owner of lands on the Mississippi had made an embankment in front of them, and at its outer end beyond low-water mark erected, without the direction or consent of the Secretary of War, a stone pier or crib, this court affirms the judgment of the Supreme Court of that State, declaring that under that section a railway company cannot construct its road over the embankment between high and low water mark, unless the damages to such owner shall first be ascertained and paid.

MOTION to dismiss a writ of error to the Supreme Court of the State of Iowa, coupled with a motion under Rule 6 to affirm the judgment.

This was a proceeding, under the statute of Iowa, by the Davenport and Northwestern Railway Company for the assessment of damages sustained by its appropriating lands for the

construction of its road. Among others is a strip situate in the city of Davenport between high and low water mark on the Mississippi River. It fronts certain lots, on which were erected a steam saw-mill, a planing-mill, and other houses. Renwick and others were in possession of the lots, and they or those under whom they claimed had made an embankment extending therefrom into the river, and erected at the end of it a stone pier, without having obtained the consent or direction of the Secretary of War. A boom was thus formed for holding logs in front of and convenient to the mill. The line of the railroad passes over this embankment between high and low water mark.

The railway company was authorized by law to construct its road, and the city of Davenport gave its consent to laying the tracks within its limits.

A judgment, rendered against the company by the Scott Circuit Court for the damages aforesaid, was affirmed by the Supreme Court. This writ of error was then sued out.

Sect. 5254 of the Revised Statutes of the United States provides: —

"The owners of saw-mills on the Mississippi River are authorized and empowered, under the direction of the Secretary of War, to construct piers or cribs in front of their mill property on the banks of the river for the protection of their mills and rafts against damage by floods and ice: *Provided, however*, that the piers or cribs so constructed do not interfere with or obstruct the navigation of the river, and in case any pier or crib constructed under authority of this section shall at any time, and for any cause, be found to obstruct the navigation of the river, the government expressly reserves the right to remove or direct the removal of it, at the cost and expense of the owners thereof."

An act of the General Assembly of Iowa, approved March 18, 1874 (Public Laws of Iowa, 1874, p. 28), is as follows: —

"AN ACT in relation to Riparian Owners on the Mississippi and Missouri Rivers.

"SECT. 1. Be it enacted by the General Assembly of the State of Iowa, that all owners and lessees of lands or lots situate upon the Iowa banks of the Mississippi and Missouri Rivers, upon which

property there is now, or may hereafter be, carried on any business which is in any way connected with the navigation of said rivers, or to which the said navigation is a proper or convenient adjunct, are hereby authorized to construct and maintain, in front of their said property, piers, cribs, booms, and other proper and convenient erections and devices for the use of their respective pursuits and the protection and harbor of rafts, logs, floats, and other water-crafts: *Provided*, that the same present no material or unreasonable obstruction to the navigation of the stream, or to a similar use of adjoining property.

"SECT. 2. It shall not be lawful for any person or corporation to construct or operate any railroad or other obstruction between such lots or lands and either of said rivers, or upon the shore or margin thereof, unless the injury and damage to such owners occasioned thereby shall be first ascertained and compensated in the manner provided by chap. 4, title 10, of the Code."

The company claimed in the courts below that the title to the soil between high and low water mark being vested in the State, a riparian owner is not entitled to damages by reason of the company's obstructing his access to the Mississippi River by their railroad in front of his premises, and that Congress, in the exercise of its exclusive jurisdiction over the navigable waters of the United States, having prescribed certain conditions on which the owners of saw-mills on the Mississippi River may erect piers or cribs in front of their property, the above act of the General Assembly of Iowa is void.

Mr. James T. Lane and *Mr. John N. Rogers* in support of the motions.

Mr. James Grant, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Although the Supreme Court of Iowa decided that Congress, under the power to regulate commerce, had jurisdiction over the Mississippi River, and having exercised that power in the way specified in sect. 5254, Rev. Stat., all State legislation in conflict therewith was void, still the question remains, whether, if a riparian proprietor improves his property with a view to its use in connection with the river, without complying with

this act of Congress, a railroad company, under the power of eminent domain granted by the State, can appropriate his improvements to its own use without his consent and without making him compensation. This, we think, is a Federal question giving us jurisdiction, but it is a question on which we do not care to hear argument. The controversy is not between the public and the riparian owner as to his right to keep up his improvements. The public does not complain, but the railroad company wants the improvements. In the hands of the company they will be just as much a nuisance, so far as the public is concerned, as they can be if kept up by the owner. As between these two parties the improvements are the property of the riparian proprietor, and if the company wants them for its own use it must make compensation. So the court below has decided, and to our minds its decision was clearly right. While in Iowa it has been held that the State owns the lands lying along the river between high and low water mark, care was taken in the act of March 18, 1874, to provide that it should not be lawful for any person or corporation to construct or operate any railroad or other obstruction between the shore and the river without compensation to the shore owners. The second section of the act is good, even though the first may conflict with what Congress had before done.

The motion to dismiss is denied, but that to affirm granted.

Judgment affirmed.

EX PARTE PERRY.

This court will not by *mandamus* compel an inferior court to reverse a decision made in the exercise of its jurisdiction.

PETITION for *mandamus*.

The petitioners filed their libel against the ship "Civilta" and the steam-tug "Restless," in the District Court of the United States for the Southern District of New York. The vessels were seized under process sued out of that court, but were released on the claimant of each giving the requisite stipulation for value.

From a decree against the claimants they respectively prayed and perfected an appeal to the Circuit Court. A decree was there rendered, Oct. 26, 1877, in favor of the libellants, amounting in damages, interest, and costs to the sum of $11,400.90, which was apportioned equally between the two vessels. The decree provided that on the payment by the claimant of either vessel of one-half of the amount, with interest thereon to the date of payment, the proceedings against such vessel and her claimant be stayed for the collection of the residue until the return by the marshal of an execution unsatisfied against the claimant of the other vessel for the other half part of said amount, or until it should otherwise appear that the libellants were unable to enforce or collect the other part of said damages, costs, and interest against the claimant of the other vessel by process from that court.

The court further adjudged that unless the decree be fulfilled or satisfied, or proceedings stayed on appeal by filing security within ten days after service of a copy of the decree upon the proctors for the claimants, the stipulators, on the appeal to that court for damages and costs, should perform their engagements, or show cause within four days after the expiration of said ten days, or on the first day of jurisdiction thereafter, why execution should not issue against them, their goods, chattels, and lands.

Notice of an appeal to this court was given. The claimant of the "Civilta" alone perfected his appeal within the required time, and rendered it a *supersedeas*.

A summary judgment for $17,323.22 was rendered by the Circuit Court, March 15, 1878, in favor of the libellants against John G. Baker, William B. Hatch, and Edward P. Hatch, stipulators on the appeal to that court, Baker being the claimant of the "Restless." A transcript of this judgment was filed in the office of the county clerk of Kings County, New York.

Edward P. Hatch was the owner of certain real estate in Brooklyn, which he had contracted to sell, but, by reason of the summary judgment, the vendee declined to complete the purchase. The Circuit Court, Jan. 4, 1879, ordered, on notice to all the parties, that on his depositing the sum of $6,200, the

price of said real estate, in the United States Trust Company simultaneously with the delivery to him of the deed, the lien of the judgment on said real estate should be vacated, and that, if the judgment should be set aside, the Trust Company should pay to said Hatch such sum so deposited, with its accumulations, — "if not, the deposit, with its accumulations, to be held subject to the further order of the court."

The deposit was made. The court, Jan. 8, 1879, denied a motion to set aside the judgment. An execution was sued out thereon May 7, 1879. The court, June 16, refused to direct that the amount so deposited be applied upon the execution, and made the further order, "that said sum of six thousand two hundred dollars ($6,200) remain in the United States Trust Company, provided the sureties, William B. Hatch and Edward P. Hatch, as principals, will give a bond to the libellants, with a satisfactory surety, in the penalty of five thousand dollars ($5,000), conditioned that if, by the decision of the Supreme Court of the United States, the 'Restless' and her sureties shall be held liable for the amount decreed against them by this court, to wit, five thousand seven hundred dollars and forty-five cents ($5,700.45), and interest thereon, then in such case John G. Baker, the claimant of the 'Restless,' and said sureties, shall pay into the registry of this court such an amount as will cover the difference between interest upon said six thousand two hundred dollars ($6,200), at the legal rate, and the sum which shall have been earned by the said sum of six thousand two hundred dollars ($6,200) in the United States Trust Company.

"And the said William B. Hatch and Edward P. Hatch having now presented such a bond to this court, and the surety named in said bond being satisfactory to, and said bond having in all things been approved by, this court," the court further ordered "that all proceedings on the part of said libellants and of the marshal of this court, under the execution herein issued to said marshal on the seventh day of May, 1879, to collect out of the property of the said William B. Hatch or Edward P. Hatch the amount of the decree against the tug 'Restless' now presently due, to wit, five thousand seven hundred dollars and forty-five cents ($5,700.45), and interest, be and the same

are hereby stayed, with leave to said libellants to move this court, on notice, for leave to proceed under said execution."

June 27, the court denied the motion of the libellants for leave to proceed under the execution.

The petitioners pray this court for a rule upon the circuit judge to show cause why a writ of *mandamus* should not be issued, commanding him to vacate and set aside the order granting a stay of proceedings under the execution, and direct the payment of the money deposited in the United States Trust Company to the marshal of the United States, under said execution as aforesaid, or why they should not have such other or further order, writ, or relief as may be just.

Mr. Robert D. Benedict for the petitioners.
Mr. John E. Parsons, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

We cannot by *mandamus* correct the judicial errors committed by an inferior court in the progress of a cause. *Ex parte Schwab*, 98 U. S. 240. We can in this way, in a proper case, compel an inferior court to act, but cannot control its decisions while acting. In the present case it appears that the Circuit Court has acted on the motion of the petitioner, and denied him what he asked. The object of this proceeding is to obtain from us an order requiring that court to reverse its former decision and grant the relief it has once refused. That is the office of a writ of error or an appeal, and not of a writ of *mandamus*. *Ex parte Flippin*, 94 U. S. 248; *Ex parte Loring*, id. 418. Neither is the case changed because the appropriate remedy may involve an inconvenient delay. In *Ex parte Whitney* (13 Pet. 404), it was held that a writ of *mandamus* ought not to be used to correct orders made by a judge in the exercise of his authority, even though such orders "may seem to bear harshly or oppressively upon the party" complaining.

Mandamus refused.

COUNTY OF GREENE *v.* DANIEL.

COUNTY OF PICKENS *v.* DANIEL.

1. Where a court of county commissioners in Alabama, pursuant to the act of Dec. 31, 1868 (Pamphlet Laws of 1868, p. 514), subscribed for stock in a railroad company, and issued the bonds of the county in payment therefor, the holder of them, or of the coupons thereto attached, is not required to present them when due to that court for allowance, before commencing suit, to enforce their payment.
2. In case of non-payment, a *mandamus* will, by the laws of the State, lie against that court to compel the assessment and levy of the necessary taxes; but the holder who resorts to the courts of the United States must there reduce the bonds or the coupons to judgment, before he is entitled to that remedy.
3. The court of county commissioners may cause the bonds to be executed in such denominations as may be agreed upon by it and the railroad company, provided the total amount for which they are issued does not exceed that set forth in the proposal accepted by the vote of the qualified electors of the county.

ERROR to the Circuit Court of the United States for the Southern District of Alabama.

The first of these actions was brought by Richard C. Daniel against the county of Greene in the State of Alabama, to recover the amount of the principal and interest on certain coupon bonds numbered from 51 to 100, each for five hundred dollars, issued by the county in payment of its subscription to the stock of the Selma, Marion, and Memphis Railroad Company. The bonds are signed by the judge of the Probate Court of the county as *ex officio* presiding officer of the court of county commissioners, and are payable at the office of said company in the city of Memphis, or at its agency in the city of New York. They bear date Jan. 1, 1877, and recite that they are "issued under and pursuant to an order of the court of county commissioners of said Greene County, made under authority of the constitution of the State of Alabama and the laws of the legislature of the State of Alabama, authorized by a vote of the people of said county at a special election held for the purpose Sept. 14, 1867." The coupons are payable semi-annually on July 1 and January 1.

The county demurred to the complaint on the ground that it does not appear therefrom that the demand sued on was ever

presented to the court of commissioners, as provided by the laws of the State. The demurrer was overruled. The county then pleaded five pleas. The first avers that the bonds and coupons were given in payment of the pretended subscription by the county to the stock of said company, and that the only authority to subscribe to said stock and to issue said bonds and coupons is found in an act of the General Assembly of Alabama, approved Dec. 31, 1868, entitled "An Act to authorize the several counties and towns and cities of the State of Alabama to subscribe to the stock of such railroads throughout the State as they may consider most conducive to their respective interests;" and that said pretended bonds and coupons being issued upon no other authority or proceedings taken by the commissioners' court of said county, are not the bonds and coupons of the said county. The second avers that the votes of the qualified electors of said county in favor of the subscription to said stock were induced and secured by certain false and fraudulent representations of the railroad company as to the expenditure of the proceeds to be derived by it from said bonds and coupons. The third, fourth, and fifth aver that the plaintiff acquired them from the company with a knowledge of the foregoing facts, and that he is therefore not a *bona fide* holder.

A demurrer to the defendant's pleas was sustained, and judgment rendered in favor of the plaintiff. The county sued out this writ of error. The material part of the proceedings of the court of county commissioners referred to in the defendant's pleas are as follows: —

"COURT OF COUNTY COMMISSIONERS, AUGUST TERM, 1869.

"THE STATE OF ALABAMA,

"*Greene County:*

"At a regular term of the commissioners' court, begun and held in and for the county and State aforesaid, at the court-house thereof in the town of Eutaw, on Monday, the ninth day of August, 1869, . . . the following proceedings were had: . . .

"Whereas the president and directors of the Selma, Marion, and Memphis Railroad Company have this day submitted to the commissioners' court of Greene County a proposition for a county subscription by said county of eighty thousand dollars to the capital

stock of said railroad company, and made application to said court to order an election within sixty days from this date, to submit the said proposition of said railroad company to the qualified electors of said county for their acceptance or rejection in pursuance of the provisions of an act of the General Assembly of the State of Alabama, entitled 'An Act to authorize the several counties, towns, and cities of the State of Alabama to subscribe to the capital stock of such railroad through the State as they may consider most conducive to their interests,' approved Dec. 31, 1868, the said proposition being that said county shall subscribe ($80,000) eighty thousand dollars to the capital stock of said company at fifty dollars ($50) per share, to be paid in the bonds of said county, payable to said railroad company or bearer in sums of one thousand five hundred dollars each, and due ten and twenty years after date thereof, with interest coupons attached for interest on each of said bonds at the rate of eight per cent per annum, to be paid semi-annually.

"It is now therefore considered and ordered by the court that the said application be and the same is hereby granted. And it is further ordered by the court that such an election shall be held in the several precincts of said county as established by law, on Tuesday, the fourteenth day of September, 1869."

"COURT OF COUNTY COMMISSIONERS, DECEMBER TERM, 1869.

"THE STATE OF ALABAMA,

"*Greene County:*

"At a court of county commissioners begun and held in and for Greene County aforesaid, at the court-house thereof in Eutaw, on the third Monday of December, A.D. one thousand eight hundred and sixty-nine, being the twentieth day of said month.

"Whereas an order was made by this court on the ninth day of August, 1869, by which the proposition in writing of the president and directors of the Selma, Marion, and Memphis Railroad Company, for a county subscription by the county of Greene of eighty thousand dollars to the capital stock of said railroad company was submitted to the qualified electors of said county at an election held at the several precincts in said county on the fourteenth day of September, 1869, conducted by the same officers and in the same manner as provided by law for general elections in this State, after giving thirty days' notice thereof, as required by law; and whereas it appears to the court, from the returns of the sheriff of said county, that such election was held on the fourteenth day of September, 1869, in pursuance of the said order, and it also

appearing to the court by the returns of said election made to the judge of the probate court of said county that the said election thus held resulted in favor of the said proposition and subscription to the capital stock of said company, . . .

"It is now ordered by the court that the said proposition and the returns of the said election be received and recorded on the minutes of this court.

"And it is further ordered that the proposition of the said company be, and the same is hereby, accepted, and the said court of county commissioners are hereby authorized and do make, in the name and for the said county of Greene, the said subscription of eighty thousand dollars to the capital stock of said company in the name set forth in said proposition; and it is further ordered by said court that the bonds of the said county of Greene, in the sums of five hundred dollars each, with interest coupons attached for semi-annual interest at the rate of eight per cent per annum, the said bonds payable to the said company or bearer at twenty years from date, and dated the first day of January, 1870, and due and payable the first day of January, 1890, at the office of the said company, or at their office or agency in the city of New York, when presented at the office of the said company or their agency, shall be issued and delivered to the said company, signed by the probate judge of said county, and that the said coupons thereto attached of twenty dollars each shall be signed by the said judge, payable in like manner on the first day of January and July of each year from and after the date of said bonds."

The proposition referred to in the foregoing proceedings was as follows: —

"*To the Honorable the Court of County Commissioners of Greene County in the State of Alabama:*

"We, the president and a majority of the board of directors of the Selma, Marion, and Memphis Railroad Company, in pursuance of the provisions of an act of the legislature of the State of Alabama, entitled 'An Act to authorize the several counties and towns and cities of the State of Alabama to subscribe to the capital stock of such railroads throughout the State as they may consider most conducive to their respective interests,' approved Dec. 31, 1868, hereby propose to the said county of Greene, through your honorable body, under and by virtue of the said act of the legislature, to subscribe for and take eighty thousand dollars of the capital stock of said

railroad company at fifty dollars per share, to be paid in the bonds of said county, payable to the said railroad company or bearer, said bonds to be so payable in the sum of one and five hundred thousand dollars each, and due ten and twenty years after the date thereof, and bearing interest at the rate of eight per cent per annum from date till paid, with interest coupons attached for interest on each of said bonds at the rate aforesaid, which interest is to be paid semi-annually, the amount of said interest and bonds to be payable as aforesaid at such time and place as may be agreed upon between the said railroad company and the judge of probate of said county, as soon as may be after the acceptance of this proposition by the qualified electors of said county, at an election held for the purpose, under and by virtue of the provisions of the said act of the legislature of the State of Alabama.

"All of which is respectfully submitted to your honorable court for your action, and that of the qualified electors of Greene County, in the State of Alabama, thereon, and is signed by us at in Perry County, in the State of Alabama, this the sixth day of August in the year 1869.

"SELMA, MARION, & MEMPHIS RAILROAD CO.,
"By N. B. FORREST, *Pres.*"

The second suit was brought by Daniel against the County of Pickens, upon coupons attached to bonds issued by it for two hundred and fifty dollars, and payable to the same company as were the bonds in the other suit. The defence was the same in both cases. In the Greene County case the proposition of the railroad company, which was made June 14, 1869, was that the county should subscribe one hundred thousand dollars to the capital stock, and issue its bonds for one thousand dollars each in payment thereof. It was accordingly submitted to the qualified voters at an election held for that purpose, Aug. 3, 1869. The vote was in favor of the subscription.

An order of the court of county commissioners, passed August 16, after reciting the result of the vote and directing the subscription to be made, contains the following: "With the consent of said company it is further ordered that fifty thousand dollars of subscription be paid for as aforesaid in bonds of the denomination of two hundred and fifty dollars each, and fifty thousand in bonds of the denomination of one thousand dollars each."

There was a judgment for the plaintiff. The county then sued out this writ of error.

The laws of Alabama bearing upon the cases are referred to in the opinion of the court.

Mr. John T. Morgan for the plaintiffs in error.

No counsel appeared for the defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The principal questions in these cases are: —

1. Whether the demurrer to the complaint should have been sustained because it was not averred specially that the coupons sued on were presented to the court of county commissioners for allowance before the suit was brought; and,

2. Whether the bonds from which the coupons were cut were void because they were not of the same denomination as those specified in the proposition of the railroad company for subscription, submitted to and voted on by the county.

As to the first question. By the Code of Alabama, sect. 826 [907], it is provided that the court of county commissioners must, in term-time, audit all claims against their respective counties; that every claim as allowed must be registered in a book kept for that purpose, and that the judge of probate, who is made by law the principal judge of the court (Code, sect. 739 [825]), shall give the claimant a warrant on the treasury for the amount allowed. This warrant it is made the duty of the county treasurer to pay on presentation, if he has funds in the treasury to meet it. Code, sect. 3395 [920]. No claim can be passed upon or allowed by the court unless it is itemized and sworn to by the claimant, or some person in his behalf having knowledge of the facts. Code, sect. 827. All claims must be presented for allowance within twelve months after they accrue and become payable, or they will be barred, unless the claimant is a minor or lunatic. Sect. 832 [909]. "No suit can be brought against a county until the claim or demand has been presented within the time limited by sect. 832 [909] to the court of county commissioners and either disallowed or reduced by such court, and refused by the party." Code, sect. 2903 [2537].

A county in Alabama is a body corporate, capable of suing and being sued. Code, sect. 815 [897]. In *Shinbone* v. *Randolph County* (56 Ala. 183), which was a suit on coupons cut from railroad bonds, while it was held to have been definitely settled that an action at law did not lie against a county on a contract which had not been presented to the commissioners' court, and by that court disallowed in whole or in part, and that such presentment and disallowance must be averred in the complaint, it was nevertheless said: "It may be the claims on which this action is founded are not required to be presented to the commissioners' court for allowance. The statute under which the bonds were issued . . . may fix definitely their validity and amount. If that be true, — and as the case is not presented, it is not for us to determine whether it is or not, — if the commissioners' court refuses to levy a tax for their payment, *mandamus* to compel them is the appropriate remedy for appellant." p. 185. In *Commissioners' Court of Limestone County* v. *Rather* (48 id. 433), it was expressly decided that bonds issued in payment of a subscription to a railroad company, signed by a majority of the court of county commissioners in the presence of the probate judge, who certified to that fact, and for the payment of which it was made the duty of the commissioners' court to levy and assess a special tax each year, were not such claims as need be presented for allowance under this section of the code. In the opinion, the court said: "The act authorizing their issuance renders it wholly unnecessary that they should be allowed by the court of county commissioners, and they are not required to be registered as claims of a different character, nor are they to be paid by warrants on the county treasurer, but altogether in a different way." p. 446.

The bonds in the present cases were issued under the act to authorize the several counties, towns, and cities of Alabama to subscribe to the stock of railroads, passed Dec. 31, 1868. Pamph. Acts 1868, 514. This act provided (sect. 1) that railroad companies might, in writing, propose to a county that it subscribe for an amount of the capital stock of the company, to be named in the proposal, at a certain price per share, and pay for it in such bonds of the county "as should be set forth

in said proposal." This proposal or application was (sect. 2) to be submitted to the commissioners' court of the county, and that court was authorized and required to order an election within sixty days, to enable the qualified electors of the county to determine whether the proposition should be accepted or rejected. At least (sect. 4) thirty days before the election the court was required to give notice of the "terms and amount of the proposed subscription." The returns of the election were to be made to the judge of probate (sect. 5), whose duty it was to receive, count, estimate, and publish the vote. If a majority (sect. 6) was found to be in favor of the subscription, the proposition was to be deemed to have been accepted, and the court of county commissioners was required to make the subscription voted in behalf of the county for the amount set forth in the proposal, and deliver the railroad company, in payment of the subscription, bonds of the county, having not less than ten nor more than twenty years to run, with interest coupons attached for semi-annual interest, payable at such times and places as might be agreed upon between the company and the judge of probate. By sects. 7 and 8 it was made the duty of the commissioners' court to levy and see to the collection of such tax, not exceeding one per cent per annum on the taxable value of the property in the county, as should be necessary to meet the interest as it fell due; and by sect. 10 the coupons past due were receivable at par in payment of this tax.

The bonds and coupons in these cases were signed by the judge of probate of the county, as the presiding officer of the commissioners' court; and it seems to us that they are, in legal effect, themselves warrants on the treasurer, given by the judge of probate after an allowance by the court of the claim of the railroad company for the payment of the county subscription, in accordance with the terms of the accepted proposal. The claim was, to all intents and purposes, audited by the court when the bonds were issued. The validity and amount of the liability were then definitely fixed, and warrants on the treasury given, payable at a future day. The treasurer could pay them when due on presentation without further action of the court, if he had funds in his hands applicable

to that purpose. In his hands they would be good vouchers for money disbursed from that fund. The provision that the coupons should be received in payment of taxes levied to meet them is entirely inconsistent with any idea of an unliquidated claim which required further auditing.

In the State courts, under the rule as stated in *Shinbone* v. *Randolph County* (*supra*), and other cases, a *mandamus* would lie without reducing the coupons to judgment, to compel the commissioners' court to levy and collect the taxes necessary to pay what was due. The rule is different, however, in the courts of the United States, where such a writ can only be granted in aid of an existing jurisdiction. There a judgment at law on the coupons is necessary to support such a writ. The *mandamus* is in the nature of an execution to carry the judgment into effect. *Bath County* v. *Amy*, 13 Wall. 244; *Graham* v. *Norton*, 15 id. 427. A suit, therefore, to get judgment on the bonds or coupons is part of the necessary machinery which the courts of the United States must use in enforcing the claim, and the jurisdiction of those courts is not to be ousted simply because in the courts of the State a remedy may be afforded in another way.

As to the second question. Sect. 11 of the act under which the bonds were issued provides "that the bonds . . . shall be of such denomination as the court of county commissioners . . . and said railroad company may agree upon, but not to be for less than one hundred dollars, nor more than one thousand dollars."

In the proposition of the company to Greene County, it was suggested that the bonds to be issued in payment of the subscription should be "in the sum of one and five hundred thousand dollars each." In the records of the court ordering the election, the proposition, as recorded, is that the bonds be "in the sum of one thousand five hundred dollars each." The final action of the court was to issue bonds of five hundred dollars.

In the Pickens County case the proposition was that the bonds be in the sum of one thousand dollars each; but after the election, with the consent of the company, it was ordered by the court that one half the amount should be in the sum of

two hundred and fifty dollars, and the other half one thousand dollars each; and the bonds actually put out were of these denominations.

As to the Greene County case, it is apparent that there was a clerical mistake, either in the proposal or the record, as to the description of the bonds to be issued, and it is easy to see that the intention was to have bonds of a thousand dollars and five hundred dollars each; but in the Pickens County case the proposition was distinctly that they should be for one thousand dollars. This, however, we consider unimportant, for sect. 11 expressly provides for bonds of such denomination as the commissioners' court and the company should agree on. From this it is clear that the parties were not bound in this particular by the sums specified in the proposal. They were limited by the proposition as accepted in respect to the total amount of the issue, but not the denomination. The bonds as issued were of such denominations as the law allowed the court and the company to agree on, and that, in our opinion, is enough.

The only other assignments of error relate to the sufficiency of the second and third pleas. As to these, it is sufficient to say that we are entirely satisfied with the rulings below. Bonds issued under the authority of a popular election cannot be set aside simply because all that may have been said by interested parties, in public speeches during the canvass which preceded the election, does not turn out to be in every respect true.

Judgment in each case affirmed.

RECKNAGEL v. MURPHY.

Certain articles were imported by A. from Liverpool, Nov. 14, 1871, upon which the collector of the port of New York exacted the duty of six cents per pound, imposed by sect. 5 of the act of July 14, 1862 (12 Stat. 547), upon "argols or crude tartar." A. claimed that they were "argols crude," and, as such, were, by sect. 22 of the act of July 14, 1870 (16 id. 266), exempt from duty. A. paid the duty under protest, and brought suit against the collector to recover it. The court instructed the jury that it was for them to determine from the evidence whether the argols in question were "argols crude," then known as such to commerce or to science, or whether they were argols that were more or less refined. *Held*, that the instruction was proper, and covered the entire ground of the controversy.

ERROR to the Circuit Court of the United States for the Southern District of New York.

This was a suit brought against Murphy, then collector of customs at the port of New York, by Recknagel & Co., to recover the amount of certain duties which they paid to him under the following protest: —

"NEW YORK, Dec. 27, 1871.

"SIR, — We protest against the assessment of duty at six cents per lb. upon the argols imported by us in the city of New York from Liverpool, and entered for consumption Nov. 14, 1871, because the act of July 14, 1862, sect. 5, as far as it relates to argols or crude tartar, is repealed by the act of July 14, 1870, sect. 22. We pay under duress to get our goods.

"RECKNAGEL & Co.

"COLLECTOR OF CUSTOMS,
"New York City."

Judgment was rendered for the defendant. The plaintiffs sued out this writ of error.

The facts are stated in the opinion of the court.

Mr. William J. Stanley and *Mr. Stephen G. Clarke* for the plaintiffs in error.

Mr. Assistant Attorney-General Smith, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The subject to which the controversy relates is an article known in commerce as argols.

Sect. 5 of the act of Congress of July 14, 1862 (12 Stat. 547), imposed upon "argols or crude tartar" a duty of "six cents per pound."

Sect. 22 of the act of July 14, 1870 (16 Stat. 266), exempted "argols crude" wholly from duty, by putting the article in the free list created by that act.

Both these acts were in force when the importations in question were made.

The controversy between the parties therefore narrows itself down to the question whether the argols of the plaintiffs upon which the duties complained of were exacted and paid were "argols crude" or not. If crude, they were not dutiable, and the plaintiffs were entitled to recover; otherwise, the defendant was entitled to a verdict in his favor.

The subject was a proper one to be enlightened by evidence and passed upon by the jury. Both were done, and a verdict and judgment for the defendant was the result.

When wine ferments, certain deposits cling to the sides or fall to the bottom of the casks. These deposits are mingled with a variety of impurities, such as glucose, leaves, sticks and particles of dust, silicate and other like things. By washing in cold water, these impurities are removed and the crude tartar is left free from their presence. The effect of the cold water is mechanical. When boiling water is applied sufficiently, crystallization and re-crystallization take place, and the product is the cream of tartar of medicine and commerce. There is refinement in the latter case, but no chemical change is wrought. Argols are used also for making tartaric acid, Rochelle salts, the preparation of tartrate of antimony, and potash called tartar emetic, as a mordant in dyeing, and for other purposes. Argols and *crude tartar* are synonyms. The phrases are used convertibly by those who deal in the article.

The lexical definition of *crude* is: "In its natural state; not cooked or prepared by fire or heat; undressed; not altered, refined, or prepared for use by any artificial process; raw." See Webster's Dic.

Upon the trial the plaintiffs produced and identified samples of argols of the several importations upon which the duties were paid, and gave proof tending to support their case. The

defendant then gave proof tending to maintain the claim of the government. The testimony of the witnesses on both sides is set out at length in the bill of exceptions. That paper then proceeds: "A large number of witnesses were called by the defendant from the trade and from among the manufactures of cream of tartar, and dealers and others, whose testimony tended to prove that there was an article of commerce and importation unlike the plaintiffs' samples which was in fact 'crude argols;' that the plaintiffs' samples exhibited at the trial were not 'crude argols;' that said samples differed from 'crude argols,' &c. . . . These witnesses also testified uniformly that plaintiffs' samples were refined argols, and in that there was a difference between them and crude argols, &c. . . . Samples of 'crude argols' were exhibited which differed as above stated from those exhibited by the plaintiffs. Also, that there was a difference between crude argols and the lees of wine, and that all these differences were well understood by the trade and by manufacturers."

The court, after recapitulating with entire fairness the substance of the testimony, said to the jury: "The only question for you to determine is whether these argols were 'argols crude,' those known to commerce as such or those known to science as such, or whether they were argols that were more or less refined."

This instruction was clear and accurate, and it covered the entire ground of the controversy. Nothing more was necessary to be said. No amount of verbiage would have improved it. The jury could have no difficulty in applying it intelligently to the facts before them.

They knew from the evidence that if there were no substantial change in the condition of the argols, as they were when they came from the wine cask, they were *crude*. On the other hand, if there were such change wrought by a process to which the argols were subjected, they lost their identity, and took their place in a new and different category. According to the nomenclature of commerce, they ceased to be *crude*, and became refined. They could not be both at the same time. The measure of refinement was of no consequence, provided it was sufficient to be material. The elaborate brief submitted for the

government shows that, in the customs laws passed from time to time by Congress, exact analogies to the case in hand have constantly occurred and are numerous. It is unnecessary particularly to advert to them.

In cases like this, the law recognizes the authority of those engaged in commerce, and adopts, necessarily and as conclusive, the meaning which they have given to words and phrases employed in their daily business.

It is needless to notice specifically the several assignments of error. They relate to the instruction given, and to several asked by the counsel for the plaintiffs and refused by the court. As regards the former, we have expressed our approval.

If the latter were in conflict with it, they were properly refused for that reason.

Conceding that they were correct, the instruction given was sufficient for the case. Nothing more could, therefore, be required of the court. *National Bank* v. *Burkhardt*, 100 U. S. 686.

Judgment affirmed.

THE "CLARA."

A small schooner, having no watch on deck, was lying at anchor inside the Delaware Breakwater in a very dark night, when vessels were constantly arriving for shelter from an approaching storm. Among them was one well manned, which, in proceeding to a proper anchorage, without any fault of either omission or commission on her part, collided with and sunk the schooner. If a sufficient watch had been on the deck of the latter, the collision might have been avoided. *Held*, that the vessel was not liable.

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

The facts are stated in the opinion of the court.

Mr. Henry J. Scudder for the appellants.

Mr. Robert D. Benedict and *Mr. E. L. Owen*, *contra.*

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is an appeal in admiralty. The case grew out of a collision between the schooners "Clara" and the "Julia

Newell," on the 25th of February, 1874, inside the Delaware Breakwater. The owners of the latter vessel libelled the former. The libel was dismissed below. Hence this appeal. The facts were found by the Circuit Court pursuant to the act of Congress of April 13, 1876, c. 77 (18 Stat. 315), which in this respect is a re-enactment of the nineteenth section of the Judiciary Act of 1789, c. 20. 1 Stat. 83.

The first-named act limits the power of this court upon appeals in such cases "to a determination of the questions of law arising upon the record, and to such rulings of the Circuit Court, excepted to at the time, as may be presented by a bill of exceptions." Here there is no bill of exceptions. As respects the facts, we cannot, under any circumstances, look beyond the findings in the record. *The Abbotsford*, 98 U. S. 440. The only question before us is as to the correctness of the conclusion of law arrived at by the Circuit Court. That, also, is set forth pursuant to the requirement of the act of 1876, and follows in the record the findings of fact.

The facts as found are as follows: —

1st, The collision occurred inside of the Delaware Breakwater, and the "Newell" was thereby sunk. The "Newell" was a small vessel of seventy-eight tons burden. In the afternoon of the 23d of February, 1874, she anchored within the breakwater for shelter from an approaching storm. The "Clara," being on a voyage from New York to Baltimore, foreseeing the coming storm, bore away and also put into the breakwater for safety. She arrived about five o'clock A.M. on the 25th of February, 1874, and while proceeding to a proper anchorage collided with the "Newell." There were then a large number of vessels in the breakwater, and others were constantly arriving.

2d, That at the time the "Clara" entered the breakwater the night was cold and very dark, the moon having gone down several hours before. That the "Julia Newell" was improperly lying without a watch on deck. That the storm was increasing, and set in about the time the "Clara" came to anchor, and was a very severe snow-storm.

3d, If the "Newell" had had a sufficient watch on deck, the accident might have been prevented.

4th, The "Clara" was well manned, and had proper lights and a proper lookout.

The conclusion of the court as to the law of the case is thus expressed: —

The failure to keep a watch on the deck of the "Julia Newell" was the cause of the collision.

Looking at the case in the light of the findings of fact, no fault whatsoever, of omission or commission, is imputable to the "Clara." It is true it was her duty, under the circumstances, to enter the breakwater and proceed to her anchorage with the greatest care and circumspection. *Culbertson* v. *Shaw*, 18 How. 584.

Whether there was any failure on her part to comply with this requirement is not shown. But the maxim applies, *quod non apparet non est.* The fact not appearing is presumed not to exist. The libellants brought the case into court and thus assumed the affirmative. The burden of proof rested primarily upon them. If in this or in any other respect there was delinquency on the part of the respondents, it was for the libellants to prove it. As the case is presented to us in the record, the "Clara" must be held entirely blameless.

Such is not the position of the "Newell." The findings as to her put her deeply in the wrong. The night was dark. The moon had gone down. The tempest had begun and was increasing. A large number of vessels were already within the breakwater, and others were constantly arriving.

This condition of things demanded the greatest vigilance on the part of all concerned.

It was necessary to their safety. Life and property were both at stake. The "Newell" had been at anchor more than twenty-four hours, and the officers in charge of her had ample time for thought and preparation. Yet it is found that amid these perils she was "lying without a watch on deck," and if she had had "a sufficient watch" the collision that ensued "might have been prevented."

There is nothing in the record which mitigates in any degree the severe condemnation which such recklessness invokes. Her fault is without excuse.

The rules of law which apply in these cases are well settled.

Where the fault is wholly on one side, the party in fault must bear his own loss, and compensate the other party, if such party have sustained any damage. If neither be in fault, neither is entitled to compensation from the other. If both are in fault, the damages will be divided. 1 Parsons, Shipp. & Adm. 525, 526; *The Morning Light*, 2 Wall. 550; *Union Steamship Co.* v. *New York & Virginia Steamship Co.*, 24 How. 307.

The want of a proper watch is a fault of great weight. 1 Parsons, Shipp. & Adm. 576, 577; *The Sapphire*, 11 Wall. 164; *The Indiana*, Abb. Adm. 330; *The Mary T. Wilde*, Taney's Dec. 567; *The Ferryboat Lydia*, 4 Ben. 523. In a cause of collision, the plaintiff, in order to recover entire damages, must prove both care on his own part and want of it on the part of the defendant. 1 Parsons, Shipp. & Adm. 529 and note 2.

This case falls clearly within the first of the categories above stated.

Decree affirmed.

LOUISIANA v. NEW ORLEANS.

1. The obligation of contracts is impaired by such legislation as lessens the efficacy of the remedy which the law in force at the time they were made provided for enforcing them.
2. A. recovered judgment, in 1874, against New Orleans, upon certain bonds issued by the city in 1854, and sued out an execution, which was returned *nulla bona*. The Act No. 5 of the legislature of Louisiana of 1870 requires that a plaintiff, having an executory judgment against the city, must file a certified copy thereof in the office of the controller, and imposes upon the latter the duty of causing the same to be registered, and of issuing a warrant upon the treasurer for the amount due thereon, without any specific appropriation therefor, &c. *Held*, that so much of said act as requires such filing and registration before A. can procure a warrant in his favor for the amount due, or resort to other means to enforce the payment thereof, does not render less effective his pre-existing remedies, and is therefore not in conflict with the contract clause of the Constitution.

ERROR to the Supreme Court of the State of Louisiana.

Morris Ranger recovered, May 1, 1874, against the city of New Orleans certain judgments. To enforce the collection

of them, he instituted, June 21, 1879, this proceeding, in the name of the State on his relation in the Third District Court of the Parish of Orleans, for a peremptory *mandamus* to compel the mayor and administrators of the city to levy and collect a special tax sufficient in amount to satisfy the judgments.

The following statement of facts signed by the attorneys for the respective parties was filed: —

"1st, That the judgments which are made the basis of this *mandamus* proceeding were rendered for the amounts — principal, interest, and costs — and at the dates stated in the petition, and had for their basis bonds issued by the city of New Orleans in 1854, to the New Orleans, Jackson, and Great Northern Railroad Company, and New Orleans, Opelousas, and Great Western Railroad Company.

"2d, That writs of *fieri facias* were issued on said judgments, and after demand made upon the city were returned *nulla bona*, and that the city has no property liable to seizure and sale.

"3d, That said judgments have never been registered in accordance with the provisions of the act of 1870.

"It is further agreed that this statement of facts is made in lieu of the note of evidence taken at the trial, which has been mislaid."

The remaining facts and the statute bearing upon the case are set forth in the opinion of the court.

Mr. D. C. Labatt for the plaintiff in error.

MR. JUSTICE FIELD delivered the opinion of the court.

This case comes here from the Supreme Court of Louisiana. On the 1st of May, 1874, the relator recovered in one of the courts of that State against the city of New Orleans, two judgments, amounting in the aggregate to $170,000, besides costs. Upon these judgments executions were issued and returned unsatisfied, after demand upon the officers of the city to point out property belonging to it subject to seizure, to be levied upon to satisfy the same. The relator thereupon presented a petition to the Third District Court of the Parish of Orleans, setting forth these facts and averring that it was the duty of the mayor and administrators of the city to provide for the pay-

ment of the judgments by levying and collecting a tax for that purpose; but that they refused to do this; and that he was unable to satisfy the judgments by the ordinary process of execution. He therefore prayed for an order upon the mayor and administrators to show cause why a writ of *mandamus* should not issue to compel them to levy and collect a tax to satisfy the judgments.

The order to show cause was granted, and upon its return the respondents filed a peremptory exception to the relator's demand, denying that he was entitled to the relief prayed; but the District Court granted the writ. Its judgment was, on appeal to the Supreme Court of the State, reversed and a decree entered dismissing the petition. The case was then brought here.

The city authorities resisted the demand of the relator for the *mandamus*, on the ground that he had not registered his judgments as required by the provisions of the act No. 5 of 1870. That act divests the courts of the State of authority to allow any summary process or *mandamus* against the officers of the city of New Orleans to compel the issue and delivery of any order or warrant for the payment of money, or to enforce the payment of money claimed to be due from it to any person or corporation; and requires proceedings for the recovery of money claimed to be owing by the city to be conducted in the ordinary form of action against the corporation, and not against any department, branch, or officer thereof. The act also provides that no writ of execution or *fieri facias* shall issue against the city, but that a final judgment against it, which has become executory, shall have the effect of fixing the amount of the plaintiff's demand, and that he may cause a certified copy of it, with his petition and the defendant's answer and the clerk's certificate that it has become executory, to be filed in the office of the controller, and that thereupon it shall be the duty of the controller or auditing officer to cause the same to be registered, and to issue a warrant upon the treasurer or disbursing officer of the corporation for the amount due thereon, without any specific appropriation therefor, provided there be sufficient money in the treasury specially designated and set apart for that purpose in the annual budget or detailed statement of

items of liability and expenditure pursuant to the existing or a subsequent law.

The act further provides that in case the amount of money designated in the annual budget for the payment of judgments against the city of New Orleans shall have been exhausted, the common council shall have power, if they deem it proper, to appropriate from the money set apart in the budget or annual estimate for contingent expenses, a sufficient sum to pay the same; but if no such appropriation be made, then that all judgments shall be paid in the order in which they shall be filed and registered in the office of the controller of the city from the first money next annually set apart for that purpose.

The Supreme Court of the State, whilst observing that the act might contain provisions which, if invoked, would be considered unconstitutional, held that, so far as it required the registry of judgments before payment, it was valid; that this requirement was a wise and useful provision, tending to restrain and check the reckless levy of taxes, and affording in a compact form a correct knowledge of the city's liabilities; that it was made in the interest of economy and the orderly conduct of the city's affairs, and neither took away any pre-existing right nor rendered less effective any pre-existing remedies, and that the relator was, therefore, premature in his action; that he should first register his judgments, and then, if payment was not made or adequately provided for in the next levy, he might proceed to enforce it.

The relator, on the other hand, assails the constitutionality of the act in question, contending that it impairs the obligation of his contracts with the city, the validity of which by the judgments thereon is not open to question, in that it compels him to do acts, preliminary to the payment of his judgments, not required when the contracts were made, and deprives him of his remedy by *mandamus;* and cites numerous decisions of this court, and of the State courts, upon the nature and extent of the constitutional inhibition against the impairment of contracts by State legislation. These decisions are familiar to us.

The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced, — by which the parties can be obliged to perform it. Whatever

legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened. The Latin proverb, *qui cito dat bis dat*, — he who gives quickly gives twice, — has its counterpart in a maxim equally sound, — *qui serius solvit, minus solvit*, — he who pays too late, pays less. Any authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition. If, therefore, we could see that such would be the effect of the provision of the act of the State, No. 5 of 1870, requiring judgments to be registered with the controller before they are paid, we should not hesitate to declare the provision to be invalid. But we are not able to see anything in the requirement which impedes the collection of the relator's judgments, or prevents his resort to other remedies, if their payment be not obtained. The registry is a convenient means of informing the city authorities of the extent of the judgments, and that they have become executory, to the end that proper steps may be taken for their payment. It does not impair existing remedies.

We do not know, from anything in the record before us, that there are any other judgments against the city of New Orleans than the two obtained by the relator, or that the city is indebted in any other sum; nor can we say that there are not ample means already in the treasury of the city for their payment, and that, upon their registry, a warrant for the amount will not be at once issued and paid. If the money be already in the treasury appropriated for their payment, or if provision be made for the levy and collection of taxes sufficient to pay them, it cannot be justly said that the relator is delayed in enforcing them by being required to place a certified copy of the judgments with the controller of the city before getting a warrant on its treasury for the amount due him. If such warrant, when obtained, be not paid, or provision be not made for its payment upon the meeting of the city council, the relator can pursue further remedies for the collection of his judgments.

Decree affirmed.

SOLOMON v. ARTHUR.

Imported goods composed of cotton and silk, the latter being the component part of chief value, were, by the act of June 30, 1864 (13 Stat. 202), subject to a duty of fifty per cent *ad valorem*.

ERROR to the Circuit Court of the United States for the Southern District of New York.

This was an action brought by Solomon Solomon and others, constituting the firm of Solomon Brothers, against Arthur, the collector of the port of New York. The following facts were admitted upon the trial, it being agreed that neither party should offer any evidence.

Plaintiffs are partners in business, and as such imported at the port of New York, in December, 1873, and January, 1874, certain goods manufactured of silk and cotton. The defendant exacted upon them a duty of fifty per cent *ad valorem*, which rate the plaintiffs paid under protest, the substantial part of which is, that under existing laws the goods are only liable to a duty of thirty-five per cent, because they are provided for at that rate by sect. 22 of the act of March 2, 1861, and sect. 13 of the act of July 14, 1862. This protest was followed by an appeal to the Secretary of the Treasury, who affirmed the decision of the collector. This suit was brought in due time.

The goods were composed of silk and cotton, in varying proportions, the warp being all cotton and the filling partly silk. It is admitted by the plaintiffs, for the purpose of this case, that silk was the component material of chief value. The goods generally are known in trade and commerce as goods made of mixed materials, but each kind thereof is also known by its specific name. If the plaintiffs are entitled to recover, judgment shall be rendered in their favor for the difference between thirty-five and fifty per cent, which amount is $461.75 gold, with $75.40 interest in currency.

The jury found a verdict for the defendant pursuant to the instructions of the court, and the plaintiffs sued out this writ.

Mr. Edwards Pierrepont and *Mr. William Stanley* for the plaintiffs in error.

The duty was exacted under the last clause of sect. 8 of the act of June 30, 1864, which imposes fifty per cent *ad valorem* "on all manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for." 13 Stat. 202, 210.

It is plain that the commercial designation of the goods in question was, "goods made of mixed materials." A commercial designation is that "known in trade and commerce."

The tariff acts recognize two species of dutiable goods, into one of which silk must enter and be "the component part of chief value," and a totally distinct kind of "mixed goods," into which silk may or may not enter in part, as the case may be.

We invite attention to the act of Aug. 5, 1861, and the act of March 2, 1861. Sect. 16 of the latter act prescribes: "On silk ribbons, galloons, braids, fringes, laces, tassels, buttons, button cloths, trimmings, and on silk twist, twist composed of mohair and silk, sewing-silk in the gum or purified, and all other manufactures of silk or of which silk shall be the component material of chief value, not otherwise provided for, thirty per cent *ad valorem*." 12 Stat. 186. Sect. 22 describes the other kind, in these words: "Manufactures, not otherwise provided for, composed of mixed materials in part of cotton, silk, wool or worsted, or flax." Id. 192. Sect. 2 of the act of August 5, which raises the duty on silk goods to forty per cent, leaves that on "mixed goods" at thirty per cent. The enumeration of the silk goods on which the duty was raised to forty per cent is precisely the same, word for word, as in the preceding act. Id. 293.

By sect. 13 of the act of July 14, 1862, the duty on "manufactures composed of mixed materials in part of cotton, silk, wool, or worsted, hemp, jute, or flax," was raised to thirty-five per cent. Id. 557.

No higher duty than thirty-five per cent had ever been imposed by any statute upon this class of goods. And it is here to be noted that the statute of 1862, which increased the duty on "manufactures composed of mixed materials," did not

change the duty upon goods of which silk was the component material of chief value.

The attempt is now made to strain the statute of 1864, relating to silk goods, to cover "manufactures composed of mixed materials," into which silk may so enter as to form the more costly part.

After enumerating some thirty silk manufactures, the section ends in the words we have first quoted.

The class of goods "known in trade and commerce as goods made of mixed materials," which are specifically named in the other statutes, and upon which the duty was in 1861, thirty per cent, and in 1862 thirty-five per cent, is nowhere alluded to in this statute of 1864. Sect. 22 expressly provides "that the duties upon all goods, wares, and merchandise imported from foreign countries not provided for in this act shall be and remain as they were, according to existing laws prior to the 29th of April 1864" (13 id. 216), and "that all acts and parts of acts repugnant to the provisions of this act be, and the same are hereby, repealed."

Thus we find running through the statutes these two classes of manufactures: those into which silk must enter; and the "mixed manufactures," into which silk might or might not enter. It is an admitted fact that the goods in question are generally known in trade and commerce as goods made of mixed materials; but inasmuch as "silk was a component material of chief value," it is argued by the learned Assistant Attorney-General that these "mixed goods" must pay a duty of fifty per cent, under the act of 1864, which relates to a totally different kind of goods.

Surely no such construction can fairly be given to the acts, and such ruling would be quite out of harmony with numerous decisions of this court. *Arthur* v. *Zimmerman*, 96 U. S. 124; *Arthur* v. *Unkhart*, id. 118; *Arthur* v. *Lahey*, id. 112; *Arthur* v. *Davies*, id. 135; *Arthur* v. *Homer*, id. 137; *Reiche* v. *Smythe*, 13 Wall. 162; *Homer* v. *The Collector*, 1 id. 486, and the long list of earlier cases on commercial designation.

Mr. Assistant Attorney-General Smith, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

It is obvious that the goods in question came under the designation of the last clause of sect. 8 of the act of June 30, 1864 (13 Stat. 210), which lays a duty "on all manufactures of silk or of which silk is the component part of chief value, not otherwise provided for, fifty per centum *ad valorem*." That duty was, therefore, properly assessed, unless the articles imported were "otherwise provided for." And that is the question. The plaintiffs insisted then, and insist now that a duty on these goods was "otherwise provided for" by the acts of March 2, 1861, sect. 22, and July 14, 1862, sect. 13, as "manufactures composed of mixed materials, in part of cotton, silk, wool or worsted, or flax," on which a duty of only thirty per cent was laid by the act of 1861, and of five per cent additional by the act of 1862. 12 Stat. 192, 557.

Previous acts were not repealed *in toto* by the act of June 30, 1864, but it was declared by sect. 22 that "all acts and parts of acts repugnant to the provisions of this act be, and the same are hereby, repealed," with a proviso "that the duties upon all goods, wares, and merchandise imported from foreign countries, not provided for in this act, shall be and remain as they were, according to existing laws prior to 29th April, 1864."

The act of 1864 contained no separate provision for a duty on goods composed of "mixed materials," like that in the acts of 1861 and 1862, on which the plaintiffs rely. They contend, therefore, that those clauses still continued in force, and that the goods imported by them were embraced therein, and were not intended to be embraced in the general clause in the act of 1864, under which the collector exacted the duty in question. The plaintiffs insist that the term "mixed materials," or "goods made of mixed materials," is a specific and well-known commercial designation or name, which by usage covers the goods imported by them, and is not a descriptive phrase used merely to designate any class of goods answering to the description; and, therefore, although they may be embraced in the general description of the act of 1864, of goods "in which silk is the component part of chief value," such a general de-

scription is not sufficient to take them out of their places in the previous acts where they are designated by name. It may be conceded that if the goods in question had a specific name, such as that applied to "reps," "tapestry," "galloons," &c., and had been designated in the acts of 1861 and 1862 by such specific name, the argument of the plaintiffs would be well founded. It would be in accordance with the decision of this court in *Movius* v. *Arthur*, 95 U. S. 144. But are the terms relied on a name for goods? Are they not descriptive rather than denominative? We think it is very clear that they are merely descriptive. It may be true, as stated in the agreed case, that "such goods are generally known in trade and commerce as goods made of mixed materials;" but the case also adds that "each kind thereof is also known by its specific name." The fact that certain goods belong to the class of mixed goods, or of goods made of mixed materials, does not stamp them with the name of mixed goods; for the same description is applicable to many other kinds of goods, all having different names. It is not their name: it is merely their description.

Since, therefore, the designation in the act of 1861, of "manufactures composed of mixed materials, in part of cotton, silk," &c., is merely descriptive; and since the designation in the act of 1864, of "manufactures of which silk is the component part of chief value," is also descriptive; and since the goods in question are confessedly embraced in both descriptions; and since the act of 1864 contains no provision relating to mixed goods, like that in the acts of 1861 and 1862, and lays a duty of fifty per cent *ad valorem* on goods in which silk is the component part of chief value, "not otherwise provided for," which we have construed generally to mean "not otherwise provided for in this act" (*Smythe* v. *Fiske*, 23 Wall. 374), — it seems to be almost a matter of demonstration that this was the duty properly demandable on the goods.

It is observable that the description of "manufactures made of mixed materials, in part of cotton, silk," &c., is more general than that of "manufactures of which silk is the component part of chief value." Logically, the two phrases standing together in the same act or system of laws would be related as

follows: "Goods made of mixed materials, cotton, silk, &c., shall pay a duty of thirty-five per cent; *but if* silk is the component part of chief value, they shall pay a duty of fifty per cent."

It is suggested by the plaintiffs' counsel that a counterpart of the clause in the act of 1864, relating to goods in which silk is the component part of chief value, was contained in the acts of March 2, 1861, and Aug. 5, 1861; and that if this clause in these acts did not apply to the plaintiffs' goods, the like clause in the act of 1864 should not be construed to apply to them; and, to show that the said clause in the acts of 1861 did not apply to the goods, they refer to the fact that, prior to the passing of the act of 1864, the goods now in question were always assessed under the "mixed materials" clause, and not under the "component material of chief value" clause. We do not think that this argument can prevail. In the first place, it does not appear by the record what the practice was prior to 1864; and if it did appear as suggested, it is observable that under the act of March 2, 1861, it was a matter of indifference under which clause the goods should be assessed, as the duties were the same under both; and, having commenced to assess the goods in one way under that act, the practice may have been inadvertently continued. We think the practice was at least questionable, if it obtained. At all events, the true construction of the law in its ultimate form is too obvious to admit of a reasonable doubt. The goods are aptly described by the general clause in the act of 1864, and are not otherwise provided for in that act, nor provided for by name in any previous act. It follows that they are subject to duty under the said general clause.

We have been unable to find anything in the clauses referred to, or in their collocation in the various acts, or in the method of grouping or classification observed therein, that would lead us to infer an intention to exclude the goods in question from the operation of said general clause. It is sometimes the case, no doubt, that certain articles are so obviously intended to be included in a particular grouping or classification, as to repel any suggestion that they are meant to be embraced in a different part of the law, though literally appli-

cable to them. But this cannot be said in the case before us. The goods in question have no such inseparable relation to one form of description exclusive of the other; nor are they so clearly intended to be embraced in any particular grouping or classification, as to repel or prevent the application to them of the clause under which they were assessed.

Judgment affirmed.

THE "BENEFACTOR."

1. At about ten o'clock in the forenoon, when the weather was clear and fine, a steamship and a schooner were on the ocean. The schooner, having seen the steamship when six or seven miles away, kept steadily on her course. The steamer saw the schooner when three miles off, and from that time until a collision between them occurred both vessels were sailing on courses which crossed each other, so as to involve risk of collision. *Held*, that under the circumstances it was the duty of the steamship to keep out of the way of the schooner, and the latter having held her course, the former is liable for the damages occasioned by the collision.
2. The ruling in *The Abbotsford* (98 U. S. 440), that under the act of Feb. 16, 1875 (18 Stat. 315), the finding of facts by the Circuit Court in admiralty cases is conclusive, and that only rulings upon questions of law can be reviewed by bill of exceptions, reaffirmed.

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

This is a libel filed in the District Court of the United States for the Eastern District of New York by William H. Mount and others against the steamship "Benefactor," to recover damages arising from a collision between that vessel and the schooner "Susan Wright."

The District Court found in favor of the libellants, and from its decree the claimants of the "Benefactor" appealed to the Circuit Court. The latter court found, —

1. That the collision took place a little after ten o'clock in the forenoon of the twenty-sixth day of February, 1875, off Squan Beach, New Jersey, and about three miles distant therefrom.

2. That the weather at and prior to the time of the collision was fine and clear, the wind about west-northwest, and strong;

the steamship was bound from New York to Wilmington, and the schooner bound from Matanzas to New York.

3. That the steamship was observed by those in charge of the schooner when six or seven miles distant therefrom, and from twenty to thirty minutes before the collision. At that time the steamship bore a point or two off the starboard bow of the schooner. The schooner was close-hauled, sailing on a course about north by west, at the rate of about eight miles an hour. The steamship was proceeding on a course about south-southwest at the rate of about ten miles an hour, with her sails set, and the wind free, and making much lee-way.

4. That at this time the courses of the two vessels were such as to cross each other, if continued, and such as to bring the two vessels either together or into close proximity to each other, and the two vessels were proceeding in such directions as to involve risk of collision.

5. That on the windward side of the two vessels, and about three miles distant therefrom, was the New Jersey shore, trending at that point about north by east and south by west, and on the leeward side was the open ocean, without any obstruction to safe navigation. There was nothing to prevent the steamship from seasonably changing her course so as to pass either to windward or to leeward of the schooner and give her a wide berth.

6. That from the time when the steamship was observed, as above stated, she was watched by those in charge of the schooner, and the schooner was kept close-hauled upon her course. The steamship was also kept upon her course, without slacking speed or stopping, until the vessels were only a few lengths apart and a collision was imminent, when the peak of her mainsail was lowered, her engines slowed and stopped, and an effort made to pass to leeward of the schooner, but without success.

7. That after the steamship was within a few lengths of the schooner, and a collision was imminent, the captain of the schooner attempted to avoid the impending collision or lessen its force by porting the helm of the schooner; but, after putting the schooner's wheel only about two spokes to port, he was driven away therefrom by the nearer and dangerous approach

of the steamship, which struck the schooner on her starboard quarter, in consequence of which the schooner sank almost immediately, with her valuable cargo.

8. That the schooner kept her course until the steamship was in close proximity and the collision was imminent, and if there was any change in the schooner's course after that, and before the collision actually took place, it was very slight; had no effect in producing the collision, and was made *in extremis*.

9. That at the time of the collision the schooner was of the value of $17,850, the cargo was of the value of $35,046.58; and both the vessel and cargo, by reason of the collision, became a total loss. The amount of damage sustained by William H. Mount, by reason of loss of and injury to his personal effects by the collision was $1,283.85. The net freight lost by reason of the collision was $1,923.14. The amount of damages sustained by the other libellants, by reason of the loss of and injury to their personal effects by the collision, was $591.15.

The court concluded as matters of law, —

1. Upon the steamship and schooner discovering each other proceeding in such directions as to involve risk of collision, as stated in the foregoing findings of fact, it was the right and duty of the schooner to keep her course, and the duty of the steamship to keep out of the way of the schooner; and the steamship was in fault in failing to perform that duty.

2. It was also the duty of the steamship, under the circumstances stated, to pursue a course which should not needlessly put the schooner in imminent peril; and the steamship was in fault in failing to perform that duty.

3. It was the duty of the steamship, before the time when she did so, to slacken her speed or stop; and the steamship was in fault in failing to perform that duty.

4. If, when a collision had become imminent by reason of the fault of the steamship, any error was committed *in extremis* by those in charge of the schooner, the schooner is not responsible therefor.

5. The steamship had no right, under the circumstances stated, needlessly to place herself in such close proximity to

the schooner that the error of a moment would bring destruction.

6. The collision was occasioned by the fault of the steamship, and the steamship should be condemned therefor.

7. The decree of the District Court was right, and should be affirmed with costs.

The claimants of the "Benefactor" thereupon appealed here.

Mr. Cornelius Van Santvoord for the appellants.

The court declined to hear counsel for the appellees.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Upon the facts as found the judgment below was clearly right. The vessels were on the ocean, and there was nothing to interfere with their navigation. The weather was clear and fine, and the time about ten o'clock in the forenoon. The schooner saw the steamer when six or seven miles away, and from that time steadily kept her course until the collision was imminent. While there is no special finding that the steamer saw the schooner, it would have been a gross fault on her part if she did not; and both in the answer and in the requests for finding presented to the court below it is stated that the schooner was seen when three miles off. From that time until the collision the vessels were sailing on courses which crossed each other, so as to involve a risk of collision. Under these circumstances it was the imperative duty of the steamer to keep out of the way, and of the schooner not to embarrass the steamer by any change of course. The schooner, mindful of her duty, did hold her course, but the steamer did not avoid a collision.

The theory of the steamer seems to have been that, as the schooner was bound for New York, she should have steered more to the eastward than she did, and that the steamer had the right to assume she would do so, and act accordingly. This is clearly wrong. The steamer was bound to govern herself by what the schooner actually did, not by what might have been done. When more than six miles from the steamer, and from twenty to thirty minutes before the collision, the schooner was close-hauled, and on a course which she held steadily all the

time. At that distance from the steamer she had the right to choose her own way of getting to her port of destination, and the steamer could not require her to change it. As the responsibility of avoiding the collision was on the steamer, it was a fault in her to get so close that a slight change in the course of the schooner, in the midst of what seemed to be imminent peril, would bring the vessels together. It is clear to us that those on board the steamer were deceived as to the movements of the schooner by the leeway they themselves were making, and that they expected to pass to the windward, when they should have shaped their course to go to the leeward.

The only remaining questions are those which arise on the bill of exceptions. In *The Abbotsford* (98 U. S. 440), we decided that on an appeal in this class of cases we could only pass on such rulings of the court below as might properly be put into a bill of exceptions on the trial of an action at law, and that the findings of fact sent up with the record were conclusive here. If there are errors in these findings, they can only be corrected at the proper time and in the proper way by the court below. We are no longer required to weigh evidence. On an appeal, the findings have all the effect of the verdict of a jury in actions at law. This must be accepted as our final conclusion as to the effect of the act of 1875 (18 Stat. 315) in this particular.

The bill of exceptions in this case contains all the evidence, and a request made of the court by the appellant to find the facts in a certain way. From this request it appears that the only material controversy about the facts was as to whether the schooner negligently changed her course so as to cross the bows of the steamer and bring on the collision. The court, after considering the evidence, which was to some extent conflicting, found that she did not. This disposed of the case, and is conclusive on us. All the exceptions taken have their foundation in this finding, and relate to questions of law which would have arisen if that had been the other way. As we cannot disturb the finding, we cannot consider the exceptions. It follows that the judgment must be affirmed, and it is consequently

So ordered.

HENTIG v. PAGE.

The Circuit Court in a foreclosure suit appointed a receiver of the rents and profits of the mortgaged land, and ordered that all persons who had come into the possession thereof *pendente lite* should surrender it to him on his demand. On their refusal to do so, a writ was issued commanding the marshal to eject them. They thereupon addressed a petition to one of the judges, praying that the writ be revoked by the court. *Held*, that an appeal does not lie from his order at chambers, denying the petition.

APPEAL from the Circuit Court of the United States for the District of Kansas.

The facts are stated in the opinion of the court.

Mr. C. A. Sperry for the appellant.

Mr. G. C. Clemens, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

On the twenty-sixth day of October, 1877, Mary A. Smith, administratrix *de bonis non* of Julia C. Wright, filed her bill in the Circuit Court for the District of Kansas, against Daniel M. Adams and others, to foreclose a mortgage made by Adams and wife on certain lands in Shawnee County, Kansas. On the 3d of September, 1878, the lands covered by the mortgage were sold by the treasurer of the county to the appellant for $64.92, being the full amount of tax, penalty, and charges due on them for the year 1877. At the time of the sale there was delivered to the purchaser a certificate, which set forth the sale, and stated that she would be entitled to a deed for the lands on the 4th of September, 1881, unless they should be redeemed prior to that time, in accordance with the provisions of law. On the 8th of February, 1879, Hentig, the purchaser, leased the premises to C. E. and W. K. Gillan for one year from the 1st of March, 1879, at a rent of $200, and put them in possession. The certificate of tax sale was recorded Nov. 18, 1878, and the taxes of 1879, amounting to $67.80, were paid by Hentig, March 10, 1879.

On the 4th of June, 1879, the court having become satisfied that the property was an inadequate security for the mortgage

debt, and that Adams, the debtor, was insolvent, appointed H. J. Page receiver of the rents and profits of the property, and ordered that "all persons in possession of such premises, whether parties to this cause, tenants under any of them, or persons who have come into possession pending these proceedings," yield up possession to the receiver on demand. On the 10th of July the receiver reported to the court that he found the Gillans in possession, who refused to surrender, claiming that they held under a lease from Hentig, and had paid $150 of their rent, and that the remainder, being only $50, was not due. The court thereupon issued to the marshal a writ of assistance, directing him to eject from the premises the persons described in the original order appointing the receiver, and to put the latter in possession. On the 12th of July, an order in the suit was entered in the order-book, directing the complainant and receiver to show cause before the district judge, at his chambers, on the 18th, why the writ of assistance should not be revoked, and directing that in the mean time nothing be done under the writ. At the time named the appellant was permitted to file in the suit what was denominated a substituted petition. This petition was addressed to the "Hon. C. G. Foster, one of the judges of the court," and set forth the claim of the appellant under the tax title with the lease to the Gillans, and concluded as follows: "Wherefore your petitioners pray that the said marshal may be enjoined from further proceeding in the execution of such writ, and that upon the hearing said writ may be revoked by an order of this court, and that your petitioner may have such other and further relief as to equity may seem meet. And as in duty bound will ever pray," &c. This petition was thereupon heard, and an order entered in the order-book as follows: —

"MARY A. SMITH, Adm'r'x, &c., Compl't,
vs.
DANIEL M. ADAMS *et al.*, Def'ts. } 2055.

"AT CHAMBERS, July 18, 1879.

"Now comes the complainant and receiver, H. J. Page, by G. C. Clemens, their solicitors, and A. J. Hentig, by Hentig & Sperry, her solicitors, and thereupon came on to be heard the matter of the petition of A. J. Hentig to enjoin the marshal from further

proceeding in the execution of the writ of assistance issued herein to put said receiver into possession of the property described in the bill of complaint and decree herein, and to revoke said writ, and was argued by counsel; on consideration whereof it is now here ordered that said petition be and is overruled and denied.

"From this order and ruling said A. J. Hentig prays an appeal to the Supreme Court of the United States, which is allowed, and the bond in appeal fixed at $300, to act as a *supersedeas*."

On the 22d of July the required bond was given and the appeal perfected. The case has been submitted under the twentieth rule, but the submission was accompanied by a motion of the appellee to dismiss for want of jurisdiction.

We think the motion to dismiss must be granted. The order appealed from is not a final decree in a "case of equity." The petition on which the order was made was in reality nothing more than a motion in the original suit by the appellant, with leave of the court, for a recall of the writ of assistance. It certainly is not a bill in equity, for it names no parties defendant and prays no process. It is addressed to one of the judges of the court, and not to the judges or to the court; and the appellees were brought in on a rule to show cause in the pending suit, and not by an original writ. Although the judge in rendering his decision gave as a reason for refusing to grant the petition that the tax certificate alone, before the expiration of the time of redemption, vested no title in the purchaser, the order as made settled no such question. The effect of what was done was simply to leave the writ of assistance in force. The rights of the parties were not changed in any particular. The appellant was still no party to the suit, and she could resist the writ as well after the order as before. She did not by her petition submit herself to the jurisdiction of the court in the cause. Her application was in the nature of a suggestion to the court that the writ had been improvidently issued, and, therefore, should be withdrawn. She has still all the legal and equitable remedies to enforce her original rights that she ever had. If the writ would not justify the marshal in putting her tenants out of possession when it was issued, it will not now. If she

could by a suit in equity enjoin the execution of the writ against her tenants before her motion was made, she could afterwards.

It follows that the appeal must be dismissed; and it is

So ordered.

GOODYEAR DENTAL VULCANITE COMPANY *v.* DAVIS.

1. The invention for which reissued letters-patent No. 1904, dated March 21, 1865, were granted to the Goodyear Dental Vulcanite Company was a set of artificial teeth, as a new article of manufacture, consisting of a plate of hard rubber with teeth, or teeth and gums, secured thereto in the manner described in the specification, by embedding the teeth and pins in a vulcanizable compound, so that it shall surround them while it is in a soft state, before it is vulcanized, and so that when it has been vulcanized the teeth are firmly and inseparably secured in the vulcanite, and a tight joint is effected between them, the whole constituting but one piece. *Held*, that the invention being a product or manufacture made in a defined manner, and not the product alone, separated from the process by which it is created, the process is as much a part of the invention as is the material of which the plate or product is composed.
2. Those letters are not infringed otherwise than by using the material and the process or their equivalents. A plate made of celluloid is not, therefore, an infringement, as celluloid is not an equivalent for hard rubber, and in preparing it for that purpose the process, which is inseparable from the invention, cannot be employed.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

This was a bill in equity brought by the Goodyear Dental Vulcanite Company against Charles G. Davis, alleging his infringement of reissued letters-patent No. 1904, dated March 21, 1865, and granted to the complainant, as assignee of John A. Cummings, for an improvement in artificial gums and plates.

The bill was, on a final hearing upon the pleadings and proofs, dismissed. The complainant appealed here.

The facts are fully stated in the opinion of the court.

The case was argued by *Mr. William Henry Clifford* and *Mr. Benjamin F. Lee* for the appellant, and by *Mr. Henry Baldwin, Jr.*, and *Mr. William D. Shipman*, for the appellee.

Mr. JUSTICE STRONG delivered the opinion of the court.

The invention described in the Cummings reissue patent is claimed in the words following: "The plate of hard rubber or vulcanite, or its equivalent, for holding artificial teeth, or teeth and gums, substantially as described." The claim cannot be understood without reference to the details given in the specification. In that it is said to consist "in forming the plate to which the teeth, or teeth and gums, are attached, of hard rubber, or 'vulcanite,' so called, — an elastic material possessing and retaining in use sufficient rigidity for the purpose of mastication, and, at the same time, being pliable enough to yield a little to the motions of the mouth." The mode of "forming" the plate is then minutely described. The earlier steps of the process need not be particularly noticed. They relate to the formation of a plaster mould, fitted to the corresponding part of the mouth, with the artificial teeth adhering in the mould in exactly the relative position they are to occupy in the hard-rubber plate. The specification then proceeds as follows: "The teeth are provided with pins projecting therefrom in such a manner that the rubber which is to constitute the plate will close around them, and by means of them hold or secure the teeth permanently in position. The plaster mould, with the teeth adhering therein, as just described, is now filled with soft rubber, a little at a time, pressed in with the finger, or in any other convenient way; and care is to be taken that the rubber is made to completely fit into the cavities and around the protuberances, including the pins, and is filled in to the thickness or depth desired to form the plate." "I then" (says the patentee) "lock the rubber plate in position by shutting the other half of the plaster mould over it, to insure its retaining its exact form while warming, and then heat or bake it in an oven, or in any other suitable way. The soft rubber or gum so inserted into the mould is to be compounded with sulphur, rubber, &c., in the manner prescribed in the patent of Nelson Goodyear, dated May 6, A.D. 1851, for making hard rubber, and is to be subjected to sufficient heat to vulcanize or harden it, substantially as directed in that patent. It is also to be colored in imitation of the natural gums, by mixing it with vermillion, or other suitable coloring matter, while in the soft

state. After the plate has been heated sufficiently to harden it, or convert it into hard rubber, or 'vulcanite,' so called, the mould is removed, and the plate is polished ready for use."

Such is the description, both of the material of which the plate is formed and of the method or process by which it is made.

We had occasion in *Smith* v. *Goodyear Dental Vulcanite Company et al.* (93 U. S. 486) to construe this patent, and determine what the invention claimed and patented really was. We held it to be "a set of artificial teeth, as a new article of manufacture, consisting of a plate of hard rubber with teeth, or teeth and gums secured thereto in the manner described in the specification, by embedding the teeth and pins in a vulcanizable compound, so that it shall surround them, while it is in a soft state, before it is vulcanized, and so that, when it has been vulcanized, the teeth are firmly and inseparably secured in the vulcanite, and a tight joint is effected between them, the whole constituting but one piece." We said, "The invention is a product or manufacture made in a defined manner. It is not a product alone, separated from the process by which it is created." The process detailed in the description antecedent to the claim, and referred to thereby, is as much a part of the invention as are the materials of which the plate or product is composed. Both are necessary elements of it. Hence, to constitute an infringement of the patent, both the material of which the dental plate is made, or its equivalent, and the process of constructing the plate, or a process equivalent thereto, must be employed. It is, therefore, essential to a correct determination of this case to consider what was the material made by the patentee an element of his invention, and what can be considered an equivalent therefor.

It is impossible to read the specification of the original patent, or that of the reissue, upon which this suit is founded, without the conviction that the patentee had in mind primarily a single substance for his material, and that one of a peculiar character, itself a compound discovered and patented not long before. Thus, in the original, which was loosely drawn, the invention was said to consist "in forming the plate and gums, to which the teeth are attached, of rubber, or some other elastic mate-

rial, so indurated as to be rigid enough for the purpose of mastication, and pliable enough to yield a little to the motions of the mouth, and in one piece, the teeth being embedded in the elastic material while the said material is in a soft condition, and then baked, with the gums and plate, so that the teeth, gums, and plate will all be connected, forming, as it were, one piece." And again, "the plate and gums are formed of one piece, and of rubber, or of rubber and the compounds commonly employed therewith, or of gutta-percha, or, in fact, of any elastic substance which can be reduced to a soft condition, *and then vulcanized*, or hardened sufficiently to answer the purpose. The rubber or other material used is first moulded to fit the shape of the mouth, and the gums formed, and while soft and pliable the teeth are embedded in the gums. . . . The teeth, gums, and plate, being thus connected, are then baked until the elastic material becomes sufficiently vulcanized, when the process is completed." The claim also expressed the same thought. It was "forming the plate and gums in which the teeth are inserted, in one piece, of hard rubber or vulcanite, *i.e.* an elastic material which can be hardened sufficiently for mastication, and retain a portion of its elasticity, so as to yield a little to the motion of the mouth, as herein set forth, and for the purposes specified." Though the specification spoke of rubber, or of rubber and its compounds commonly employed therewith, or of gutta-percha, or of any elastic substance that can be reduced to a soft condition and then vulcanized, or hardened sufficiently to answer the purpose, it is evident that only such substances were intended as are either soft in their natural condition, and capable of vulcanization, or if hard naturally, and reduced to a soft state, were then capable of being vulcanized or hardened by baking. The description implies an exclusion of all substances which have not such capabilities. If not, then gold plates would have been within the patent, if the material only be considered, for gold is elastic when in thin plates. It is capable of being reduced to a soft condition, and it hardens by cooling; but it does not harden by heat or baking, nor is it capable of vulcanization.

If, now, we turn to the specification and claim of the reissued patent (which, of course, cannot be more comprehensive

than the original), it will be found that the material is still more distinctly and exclusively pointed out. The material is, so far as possible, restricted to a substance either vulcanized or capable of vulcanization. There the invention is said to consist "in forming the plate to which the teeth, or teeth and gums, are attached, of hard rubber or vulcanite, so called, an elastic material," of certain capabilities mentioned. Not an intimation is given that any other substance than hard rubber, or its synonym, vulcanite, would meet the requirements of the invention. Throughout the specification the patentee speaks again and again of his invention as a hard-rubber plate, and he describes minutely the process or mode of making it. After having mentioned the arrangement of the teeth in a mould, he says: "The plaster mould, with the teeth adhering therein, is now filled with soft rubber, a little at a time, pressed in with the finger, or in any other convenient way," &c. "I then lock the rubber plate in position by shutting the other half of the plaster mould over it, to insure its retaining its exact form while warming, and then heat or bake it in an oven, or in any other suitable way. The soft rubber, or gum, so inserted in the mould, is to be compounded with sulphur, rubber, &c., in the manner prescribed in the patent of Nelson Goodyear, dated May 6, A.D. 1851, for making hard rubber, and is to be subjected to sufficient heat to vulcanize or harden it, substantially as directed in that patent." Thus it appears that, whatever the material used in the construction, a dental plate, according to the patent, was required to undergo a process of vulcanization in the manufacture, and to be made what it is, whether denominated rubber, hard rubber, vulcanite, or other elastic material, by that process. Every substance not capable of vulcanization by that process was, therefore, necessarily excluded from the reach of the patentee's invention. Nothing could more plainly show that a dental plate made of any other material than a compound, vulcanized according to Nelson Goodyear's process, was not intended by the patentee and by the Patent Office to be covered by the patent. By Goodyear's patent caoutchouc, or soft rubber, is converted into hard rubber; that is, vulcanized, by mixing sulphur with it in about the proportions of from four ounces to a half pound of the

former to a pound of the rubber, and then heating the compound during a period of from three to six hours, to the temperature of from two hundred and sixty to two hundred and seventy-five degrees of Fahrenheit. The use of that process was made indispensable to the invention, and its product was the material of which the patented plate is constructed. If, when the patent was granted, there were known substances, other than rubber or caoutchouc, gutta-percha, or gums, that could be vulcanized by the Goodyear process, and converted from a soft into a hard, elastic material, any use of that material for a dental plate might have been an equivalent for the Cummings material, and an infringement of his patent.

This construction of the patent is confirmed by the avowed understanding of the patentee, expressed by him, or on his half, when his application for the original patent was pending. We do not mean to be understood as asserting that any correspondence between the applicant for a patent and the Commissioner of Patents can be allowed to enlarge, diminish, or vary the language of a patent afterwards issued. Undoubtedly a patent, like any other written instrument, is to be interpreted by its own terms. But when a patent bears on its face a particular construction, inasmuch as the specification and claim are in the words of the patentee, it is reasonable to hold that such a construction may be confirmed by what the patentee said when he was making his application. The understanding of a party to a contract has always been regarded as of some importance in its interpretation.

In his letter to the commissioner, under date of July 30, 1855, written by his attorney, after striking out all reference to gutta-percha, he said: "I beg the office not to consider that because gutta-percha has been used heretofore with artificial teeth, Mr. Cummings's invention is, therefore, the mere substitution of one substance for another and a similar one. The vulcanizing process makes all the difference, and changes the article of manufacture entirely." So in his letter of the same date he amended his specification so as to make it read: "I do not claim the use of gutta-percha, or of any material which is merely rendered plastic by heat and hardened by cooling, in the manufacture of sets of artificial teeth; but what I do claim as my

invention, and desire to have secured to me by letters-patent, is the improvement in the manufacture of sets of mineral or other artificial teeth, which consists in combining them with a rubber plate and gums, which (after the insertion of the teeth) are vulcanized by Goodyear's process, or any other process." . . .

On a renewed application, Dr. Cummings was informed that the office would not object to the admission of a claim limited to the use of vulcanite or hard rubber. In response to this he amended his claim by inserting the word "hard" before "rubber," and also by striking out the word "other" before the words "elastic material," in the claim as previously made, and substituting therefor the words "vulcanite, *i. e.* an," so as to make it read, "forming the plate and gums in which the teeth are inserted in one piece of hard rubber, or vulcanite, *i. e.* an elastic material." Thus the patent was granted. In view of this there can be no doubt of what Cummings understood he had patented, and that both he and the commissioner regarded the patent to be for a manufacture made exclusively of vulcanites by the detailed process. We think this, to some extent, at least, tends to confirm the conclusions at which we have arrived in interpreting the patent by its own language. Indeed, we have heretofore expressed doubts whether reissued letters-patent can be sustained in any case where they contain claims that have once been formally disclaimed by the patentee, or rejected with his acquiescence, and he has consented to such rejection in order to obtain his letters-patent. *Leggett* v. *Avery*, 101 U. S. 256. If these doubts be well founded, and the claim of the reissued letters now before us be, what these complainants insist it is, a claim for the use of any other material than vulcanite, or some substance capable of vulcanization, another question might arise respecting the validity of the reissue.

We have extended our remarks sufficiently upon this branch of the case. It remains to inquire whether the manufacture, by the defendant, of dental plates, out of the material known as celluloid, or solid collodion, is an infringement of the Cummings reissue. We think it is not.

Celluloid is a substance of a comparatively recent discovery.

Whether it was known at the time Cummings made his invention, or even at the time when his original patent was granted, we do not care now to inquire. It is sufficient for this case that we consider what it is. It is a compound of vegetable fibre, cellulose, or gun-cotton. Undoubtedly it can be employed for manufacturing dental plates, and as a base for artificial teeth. Such a plate may have the fineness, lightness, and elasticity of a plate made of hard rubber by the Cummings process; but it is a substance very different from hard rubber, and it is incapable of the same manipulation. It is not vulcanite, and neither it nor its ingredients are capable of being vulcanized. It contains no sulphur or rubber. None of its constituents are vulcanizing agents. Camphor does not perform the function of sulphur. Under the action of heat its tendency is to soften the compounded mass rather than to harden it, as sulphur does rubber. When the ingredients of celluloid are compounded the product is hard, unlike caoutchouc, or gums generally, and heat softens rather than hardens it. When employed in manufacturing dental plates, the process is wholly unlike that employed in making hard rubber or vulcanite plates. It is put into a mould, it is true, such as was known and in use before the Cummings invention, but it is put in in a hard state, in its natural condition, and not soft or plastic, and capable of being pressed around the teeth. The mould cannot be closed until heat is applied. When that is applied the jaws of the mould are gradually screwed together as the celluloid softens, and when the jaws come together the plate is completed. The process requires pressure in addition to heat in order to reduce the plate to shape, and compress it around the teeth. There is no heating for hours, as is necessary in the vulcanizing process. The work is done in a few minutes. When allowed to cool, it is the same hard and bony substance it was before its manipulation, and in this respect also it is unlike vulcanite. It is obvious from all this that neither in the nature of the material of which it is made, nor in the process of manufacture, which is an essential part of the Cummings invention, as we have seen, is the celluloid plate substantially the same as one made of hard rubber.

Nor is celluloid an equivalent for hard rubber, for the rea-

sons already suggested, that it is not capable of vulcanization, and that it cannot be made into a plate by the process prescribed by Cummings. It may be conceded the patentee is protected against equivalents for any part of his invention. He would be, whether he had claimed them or not. But when a product arrived at by certain defined stages or processes is patented, only those things can be considered equivalents for the elements of the manufacture which perform the same function in substantially the same way. The same result may be reached by different processes, each of them patentable, and one process is not infringed by the use of any number of its stages less than all of them.

In view of these considerations, we are constrained to rule that a celluloid dental plate is not an infringement of the Cummings patent. Celluloid is not an equivalent for the material which the patent makes essential to the invention, and in the use of it for a dental plate, the process which is inseparable from the invention is not, and cannot be, employed.

Decree affirmed.

GARNEAU v. DOZIER.

1. *Ball* v. *Langles* (*supra*, p. 128) reaffirmed.
2. Reissued letters-patent No. 6397, granted April 20, 1875, to Duncan McKenzie for a new and useful improvement in baker's ovens, must, in view of the state of the art at the time the original letters were granted, be so construed as to limit the element of the combination which relates to the communication between the furnace or fireplace and the interior of the oven, to the peculiar structural arrangement, whereby the products of combustion are admitted into the baking-chamber through openings in the arch or top of the furnace, and through the floor of the oven that separates it from the fire-chamber along the flues extending rearward from the furnace to the back part of the oven.
3. There is, therefore, no infringement of the reissued letters where the bottom of the baking-chamber is not separated by any partition or diaphragm from the fire-chamber or furnace, and there are no flues to conduct the generated heat into the chamber.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

Joseph Garneau brought his bill of complaint against James Dozier and others. It is founded upon two letters-patent, the first being a reissue granted to Hosea Ball on the fourteenth day of June, 1870, and extended for seven years from Sept. 23, 1870. The original letters were granted to Ball Sept. 23, 1856, for an alleged "new and useful improvement in ovens," and were surrendered and reissued Oct. 12, 1869, and again June 14, 1870. The second letters set forth in the bill were granted to Mary Ann Elizabeth McKenzie May 1, 1860, also "for a new and useful improvement in ovens." They were surrendered and reissued April 19, 1870, reissued again April 20, 1875, numbered 6,397, assigned to Duncan McKenzie March 24, 1874, and extended for seven years from May 1, 1874. By sundry assignments these extended reissues have become the property of the complainant, and it is for the alleged infringement of them that this suit was brought.

The bill was dismissed on a final hearing upon the pleadings and proofs, and Garneau appealed.

The case was argued by *Mr. Robert H. Parkinson* for the appellant, and by *Mr. Edward Boyd* for the appellees.

MR. JUSTICE STRONG delivered the opinion of the court.

Among the defences set up in the answer of the defendants is one that strikes at the validity of the reissue of the Ball patent. It is insisted that the reissue is not for the same invention as that for which the original patent was granted, but is "for more and other matters and things than those of which he was the original and first inventor, and more than were described or included in the specification attached to said original patent granted to him, or shown in the drawing attached thereto, or in the model forming part of the application for said patent."

It is hardly necessary to say that if the reissue is, in fact, what the answer alleges it to be, if it is not for the same invention as that described or shown in the specification of the original patent, or in the drawings or model accompanying it, and if this clearly appears from a comparison of the two patents, the original and the reissue, then the reissue is

invalid. The question is not a new one in this court. It was before us in the recent case of *Ball* v. *Langles* (*supra*, p. 128), in which we held the reissue to be void. We expressed our opinion in that case that in the original specification, drawing, or model of Ball's patent there was no hint of conducting the products of combustion from a fire-chamber under or below an oven *directly* into or through the baking-chamber, but that what was claimed or exhibited was conducting the heat or other products of combustion into flues leading from the fire-chamber, and exterior to the baking-chamber, towards the chimney, and permitting no access to the interior chamber, or the oven, except through perforations in its side or back walls. By that arrangement the oven was principally heated by radiation from its sides, and not at all by radiation directly from the fire-chamber. But the reissue was for a very different arrangement. It claimed an invention for passing the heat or products of combustion *directly* from the fire-chamber into the oven, not by any circuitous route, but immediately through apertures in the bottom of the oven, as well as indirectly through perforations in the side flues. This we regarded as radically different from the original invention, as new matter, for which the reissue was unauthorized. We have seen in this case no reason for changing the opinion. The Ball reissue, therefore, is held to be invalid, and its further consideration may be dismissed from the case.

We pass, then, to a consideration of the McKenzie patent, the only one that confers any rights upon the complainant. The original was, as we have seen, granted on the first day of May, 1860. There have been two reissues, the first granted April 19, 1870, and the second April 20, 1875, after an extension had been allowed.

The invention, as described in the patent, consists, first, in the combination in an oven for baking bread and other substances, of the following elements: "A furnace or fireplace, one or more, a baking-chamber arranged above such furnace or fireplace, and in direct communication therewith, and a rotating reel located within said baking-chamber, and provided with gravitating pans or shelves arranged or hung around the shaft of said reel from rods attached to the end plates or arms

thereof," by which, as the specification declares, the patentee produced a "continuously baking oven, in which the bread or other substances are subjected to the direct action of the gaseous products of combustion, ascending from the lower portion or bottom of the oven." Second, "in an arrangement of flues or openings communicating from the fireplace or fireplaces with the baking-chamber, directly through the floor of the latter;" and, third, "in certain combinations and arrangements of exit flues . . . for securing a proper circulation of the gaseous products of combustion through the oven or baking-chamber, both when baking and lighting the fire." Having thus stated generally the nature and object of his invention, the patentee proceeded to describe the construction and arrangements by which the oven is heated. From the back of each furnace or fire-place a flue is constructed extending horizontally to the rear wall of the oven. From the fireplaces and along those flues a series of openings is made through the floor of the oven, communicating with its interior. Between the two furnaces and extending from the front to the rear of the oven, directly under the floor, another flue is constructed communicating with a vertical flue at the rear of the oven, which leads to the chimney. In this latter horizontal flue there are openings into the baking-chamber at its front and rear, which may be closed by valves operated from the front. This flue is the exit-flue by means of which the gaseous products of combustion escape from the oven through the valvular openings. In the centre of the top of the oven there is also a valvular opening, communicating by a horizontal flue with the vertical flue that leads to the chimney, which is also an exit for the products of combustion. Having thus described the arrangements for heating the oven, the specification next proceeds to set forth the arrangements for the reel with its gravitating pans or shelves. These it is unnecessary to notice particularly.

The specification claims five combinations, the first of which only is charged to have been infringed by the defendants. It is as follows: "The combination of the following elements, to wit, a furnace or fireplace (one or more), a baking-chamber arranged above such furnace or fireplace, and in direct com-

munication therewith, and a rotating reel located within said baking-chamber and provided with gravitating pans or shelves arranged or hung around the shaft of said reel from rods attached to the end plates or arms thereof, substantially as and for the purpose described."

To determine accurately the extent of the invention secured by this patent, the state of the art at the time when the original patent was granted (May 1, 1860) must be considered. Before that time, ovens were well known, and they had been constructed with a baking-chamber, a fireplace or furnace (one or more) arranged immediately under the chamber, and with a rotating reel located within the chamber, and revolving around a horizontal shaft, the reel provided with gravitating shelves or pans suspended on rods attached to its arms. Some of these ovens were arranged so that a portion of the heated products of combustion should pass into and through the baking-chamber, though indirectly by a circuitous route. Such was the Carrot oven patented in France in 1840, and notably the oven patented to Hosea Ball in 1856. And the Jennison oven, in use in the spring of 1859, and patented Feb. 1, 1859, was constructed so as to admit the products of combustion directly from the fire or furnace into the baking-chamber. It is obvious, therefore, that if the McKenzie patent can be sustained at all, it must receive a very limited construction. The element of the combination which relates to the communication between the furnace or fireplace and the interior of the oven must be restricted to the peculiar structural arrangement by which the products of combustion are admitted into the baking-chamber.

They are admitted, as we have seen, through openings in the arch or top of the furnace, and through the floor of the oven along the flues extending rearward from the furnace to the back part of the oven. But the oven has a floor which separates it from the fire-chamber. The communication with the baking-chamber is by means of flues, short it may be, but admitting the products of combustion into the baking-chamber only at intervals, and always near the side. Manifestly neither such an arrangement, nor anything equivalent to it, is found in the defendants' ovens. In them the bottom of the baking-

chamber is not separated by any partition or diaphragm from the fire-chamber or furnace, and there are no flues to conduct the generated heat into the chamber. The charge of infringement is, therefore, not sustained.

Decree affirmed.

HERYFORD *v.* DAVIS.

1. In Missouri, where personal chattels have been sold and delivered, the vendee's mortgage or deed of trust on them to secure the purchase-money, he still retaining possession of them, is invalid against his creditors, unless it be acknowledged or proved, and recorded in the county in which he resides, in such manner as conveyances of land are, by law, directed to be acknowledged or proved and recorded.
2. A contract between A., a manufacturer of cars, and B., a railroad company in Missouri, recites that A. thereby agrees to loan to B., for hire, certain cars to be used upon its road "for hire as aforesaid;" that A. has received from B. its three promissory notes, two at sixty days and the other at four months, together with certain bonds of the company as collateral for said notes; that A. is to hold the notes as collateral security and collect them at maturity, and hold the proceeds for the safe custody and return to A., when demanded, of said cars delivered to B. "for the term of four months, for hire as aforesaid," the latter to have the right and privilege at any time during the four months to purchase the cars upon the payment to A. of $6,338.40, that being the amount of the notes; that until such payment is made in full B. shall have no right, title, claim, or interest in or to the cars, except as to their use for hire, but that they shall remain the property of A., to be accounted for by B. and redelivered to A. in default of the payment of the $6,338.40; that in the event of default being made in the payment of said notes, and A. shall elect to take the cars into his possession, the sums collected on the notes shall be retained by him for his own use, together with such a sum, to be realized from the sale by him of the cars, as may be needed to make the amount due and unpaid on the notes, the balance, if any, to be paid to B.; that upon the payment by the latter of said notes at maturity without hinderance or delay said cars shall belong to and become the property of B., and that A. will relinquish his ownership to them, and give B. a good and sufficient bill of sale or conveyance thereof. The cars were delivered to B., but the contract was not recorded. C., having obtained a judgment against B., levied his execution on the cars. *Held*, 1. That the contract was not a bailment nor a conditional sale, but that under it the ownership of the cars passed to B. 2. That to protect them from seizure and sale under C.'s execution the contract should have been recorded in the manner prescribed by the laws of Missouri for recording mortgages or deeds of trust of personal property.

ERROR to the Circuit Court of the United States for the Western District of Missouri.

This is an action under the statutes of Missouri, by Henry H. Davis, sheriff of Chariton County, for the use of the Jackson and Sharp Company, a corporation under the laws of Delaware, upon a bond executed and delivered to him by William Heryford and James W. Lewis, to indemnify him against all damages which he might sustain in consequence of the seizure and sale of certain cars levied upon as the property of the Keokuk and Kansas City Railway Company, under an execution sued out on a judgment rendered in favor of said William against the latter company and the Western Construction Company in the Circuit Court of Chariton County, Missouri.

A trial by jury having been waived by the written stipulation of the parties, the court below found the facts as follows: —

1. That on and prior to Dec. 23, 1873, the Jackson and Sharp Company was incorporated by Delaware, having its office and doing business at Wilmington, in that State, and engaged in manufacturing railroad cars; that the Keokuk and Kansas City Railway Company was incorporated by Missouri, and engaged in the construction of a railroad through the county of Chariton and other counties in the latter State.

2. That, Jan. 5, 1874, the car company delivered to the railway company at Salisbury, Missouri, to be used on its road, one passenger car, No. 1, and one mail, baggage, and express car, also No. 1, lettered with the name of the railroad company, under and pursuant to the terms and conditions of the following articles of agreement entered into Dec. 23, A.D. 1873, by and between said car company of the first part, and the said railway company of the second part. It recites, —

"That the party of the first part has constructed one passenger car, No. 1, and one mail, baggage, and express car, also No. 1, and lettered with the name of the aforesaid railway company, to be used on the railroad of the party of the second part for hire," and then proceeds: "It is therefore agreed as follows: The said party of the first part hereby agrees to loan to the said party of the second part, for hire, the said passenger, and mail, baggage, and express cars for the space of four months from the date of this agreement, to be used

on said railway, and to deliver the same to the party of the second part at Wilmington, Delaware, to be transported to the said railway company at Salisbury, Missouri, at the expense and risk of the party of the second part, to be used on the said railway for hire as aforesaid, and not elsewhere, without the written consent of the party of the first part.

"The party of the first part has received from the party of the second part three promissory notes of the party of the second part, to the order of the Western Construction Co., and indorsed by A. C. Vandewater, president, F. A. Jones, John Foggett, A. C. Vandewater, G. P. Lawrence, John C. Noyes, and J. W. Morse, together with thirteen of the first-mortgage bonds of said railway company, of $1,000 each, as collaterals for said notes; two of said notes are dated Nov. 14, 1873, one payable at sixty days, and the other at four months, each for $1,919.20, payable, with interest at the rate of ten per cent per annum, after date, at the Mercantile Bank of St. Louis, Missouri; the other of said notes is dated Dec. 15, 1873, payable at four months, for $2,583, without interest, at the National Bank of Commerce, New York, which said three notes the said party of the first part is to hold as collateral security, and to collect the same at maturity, and to hold the proceeds, when collected, for the safe custody, and return to the party of the first part, when demanded, of the said passenger, and mail, baggage, and express cars, delivered to the party of the second part for the term of four months, for hire, as aforesaid, the said party of the second part to have the right and privilege to purchase at any time the said passenger, and mail, baggage, and express cars within the period of four months from aforesaid date, upon the payment to the party of the first part in cash the sum of $6,338.40, with interest at the rate of ten per cent per annum from the date of the agreement until day of payment; but until such payment is made in full the said party of the second part shall have no right, title, claim, or interest in and to the said passenger, and mail, baggage, and express cars, except as to their use or hire, nor any right or authority in any way to dispose of, hire, sell, mortgage, or pledge the same, but the said cars are, and shall remain, the property of the party of the first part, to be accounted for by the party of the second part to the party of the first part, and to be redelivered to the party of the first part, when demanded, in default of the payment of the aforesaid sum of $6,338.40, with interest as aforesaid, hereinbefore described, anything to the contrary herein contained notwithstanding.

"It is also agreed that should there be any default in the payment of any one of the above-described three promissory notes at the time and on the day that they, or either of them, respectively become due and payable, and the party of the first part shall elect to take into their own possession the above-described passenger and mail, baggage, and express cars, delivered as aforesaid, the several sums which may have been collected on account of the above-described promissory notes are to be retained by the party of the first part for their own use, and the passenger and the mail, baggage, and express cars are to be sold by the party of the first part at public or private sale, and of the net amount realized from said sale so much as should be needed to make the amount remaining due and unpaid on the above-described promissory notes, with the interest that may have accrued on the same, shall be retained by the said party of the first part, and the surplus, if any, shall be paid over to the said party of the second part.

"And the said party of the first part hereby agrees with the said party of the second part, that if all the said three promissory notes are paid on the day and at the time that they severally became due and payable according to their terms, tenor, and effect, that upon payment of all the said notes having been made without any hinderance or delay whatever, the party of the first part will then relinquish their ownership to the said passenger car and the mail, baggage, and express car, and will give to the party of the second part a good and sufficient bill of sale or conveyance for the said cars, and will apply to the payment of the same the proceeds of the above-described promissory notes, interest on notes overdue in any event to belong to the party of the first part.

"And it is also agreed and understood that, if the said notes are paid according to their tenor and effect, the said party of the first part may retain the money paid upon said notes, and then the said cars shall belong to and be the property of the said party of the second part, and the said party of the first part shall, on request, relinquish their ownership thereof, and make a bill of sale or conveyance of all their right, title, and interest therein, to the said party of the second part.

"In witness whereof, the parties have hereto set their name and caused the seal of their respective corporations to be affixed.

[SEAL.] "JACKSON AND SHARP COMPANY,
"JOB H. JACKSON,
"THE KEOKUK AND KANSAS CITY RAILWAY CO.,
By S. H. MELVIN, *President.*
[SEAL.] "ALBERT BLAIR, *Secretary.*"

3. That said cars were brought to Missouri and were placed upon and used by said railroad company on its railroad in Chariton County, Missouri.

4. That the notes mentioned in said contract were not paid at maturity, and still remain unpaid; that, Dec. 4, 1873, the Jackson and Sharp Company received $13,000 in the first-mortgage bonds of said railroad company as collateral security for said notes, for which it executed and delivered its receipt, as follows: —

"WILMINGTON, DEL., Dec. 4, 1873.

"Received of Keokuk and Kansas City R. R. Co., thirteen one thousand dollar bonds, No. 281 to 293, both numbers inclusive, as collateral for said Co. notes given in payment for one passenger car, and for notes yet to be given for one mail, bagg., and ex. car.

"JOB H. JACKSON, *Pres't.*"

5. That said bonds are yet in the hands of that company.

6. That the defendant, Heryford, under and by virtue of the provisions of an act of the General Assembly of Missouri, entitled "An Act to protect contractors, sub-contractors, and laborers in their claims against railroad companies or corporations, contractors, or sub-contractors," approved March 21, 1873, obtained, Nov. 20, 1874, a judgment in the Circuit Court of Chariton County, Missouri, against the said railroad company and the Western Construction Company, for materials furnished and labor performed by him in the construction of the road, which said judgment it was declared should be a lien upon the "road-bed, station-houses, depots, bridges, rolling-stock, real estate, and improvements pertaining to said railroad within the counties of Clark, Knox, Macon, Randolph, and Chariton, in the State of Missouri."

7. That on Nov. 25, 1874, an execution was issued on the judgment.

8. That Davis, sheriff of Chariton County, Missouri, indorsed and returned the execution as levied "upon the following-described property as the property of the Keokuk and Kansas City Railway Company and the Western Construction Company, to wit, the road-bed, iron, and cross-ties thereon of the Keokuk and Kansas City Railway Company, station-houses,

depots, bridges, rolling-stock, and improvements appertaining to said road, situated in Chariton County; also a lot of cross-ties piled up along the line of said road, supposed to be about seven thousand; also locomotive engine No. 1, named James W. Lewis, and tender of the same; one passenger-coach No. 1, branded K. & K. C. R. W. Co.; and one mail and express car, branded K. & K. C. R. W. Co.; four box or freight cars; two coal-cars; one flat-car; three hand-cars; two iron-cars; one set blacksmith tools; one lot shovels, spades, and picks; and all the tools and implements pertaining to said railroad which are in Chariton County, and all the furniture in the railroad and construction cars; office in the town of Salisbury."

It was also returned May 3, 1875, by Berry Owens, sheriff of Chariton County as levied "on one box-car, three rubber-cars, and three break-jacks, as the property of the Keokuk and Kansas City Railway Company and the Western Construction Company."

That Heryford, prior to Dec. 12, 1874, caused Davis to levy upon and seize, under an execution issued from the Circuit Court of Chariton County, Missouri, in his favor and against the Keokuk and Kansas City Railway Company and the Western Construction Company, the cars in said contract described.

That on Dec. 13, 1874, the Jackson and Sharp Company served notice upon the sheriff claiming the passenger car and mail, baggage, and express car under and by virtue of chap. 55, sect. 28, p. 608, vol. i. Wagn. Mo. Stat., title "Executions."

That the sheriff thereupon gave Heryford notice of the claim of the company, who, Dec. 15, 1874, executed and tendered his bond to the sheriff, with Lewis as security, conditioned "that the said bounden William Heryford and his securities will indemnify the said H. H. Davis, as sheriff aforesaid, against all damage and costs which he may sustain in consequence of the seizure and sale of the above-described passenger-coach No. 1, and mail, baggage, and express car No. 1, branded with the name of the K. & K. C. R. W. Co., and to satisfy and pay to any person or persons claiming the same all damages which said person or persons may sustain in consequence of such seizure and sale."

That by virtue of the execution aforesaid, and in pursuance

of chap. 55, sect. 58, p. 608, vol. i., Wagn. Mo. Stat., title "Executions," Berry Owens, sheriff of Chariton County, Missouri, on May 1, 1875, advertised and sold the said passenger-car, and mail, baggage, and express car, so levied upon.

That prior to the sale and after the levy the defendants had knowledge of the contract of Dec. 23, 1873.

That the parties, in negotiating their contract of Dec. 23, 1873, and in the subsequent correspondence and dealings after the execution of the same, treated and undertook said contract as a conditional sale.

That the contract has never been acknowledged or recorded.

That the cars were, at the time they were delivered, marked and branded as described in the contract.

That the value of the cars, at the time of the seizure by the sheriff, was $3,800.

As a conclusion of law, the court found that the plaintiff was entitled to recover of the defendants $3,800, with interest, by way of damages, in the sum of $540, together amounting to $4,340, and rendered judgment accordingly.

Heryford and Lewis thereupon sued out this writ of error.

Upon the facts and in the rendition of the judgment the judges were divided in opinion upon the following points, which are certified here: —

1. Whether on the facts the plaintiff or the defendants were entitled to judgment.

2. Whether the instrument under which the plaintiff claims was required by the laws of Missouri to be registered in order to be valid against the creditors of the said railroad company, the property in question having been delivered to and being in possession and use of the said company at the time of the levy.

3. Whether the said instrument is a "mortgage or deed of trust of personal property," within the meaning of the statutes of Missouri; viz., 1 Wagn. Stat. p. 281, sect. 8.

Mr. Thomas T. Crittenden for the defendant in error, in support of the judgment below.

The contract of Dec. 23, 1873, was a conditional sale of the cars, at a fixed price, to be paid on a certain day, the title to remain in the seller until payment. Such payment was a

condition precedent to the vesting of title in the buyer, and, not having been made, the cars were not subject to levy under the execution. *Porter* v. *Pettingill*, 12 N. H. 298; *Bigelow* v. *Huntley*, 8 Vt. 151; *Ayre* v. *Bartlett*, 9 Pick. (Mass.) 156; *Reed* v. *Upton*, 10 id. 522; *Fairbanks* v. *Phelps*, 22 id. 535; *Strong* v. *Taylor*, 2 Hill (N. Y.), 326; *Hunt* v. *Bay State Iron Co.*, 97 Mass. 279; *Fenwick* v. *Smith*, 63 Pa. St. 18; *Clarke* v. *Farnum*, 7 R. I. 174; *Coggill* v. *Hartford & New Haven Railroad Co.*, 3 Gray (Mass.), 545.

The plaintiffs in error had notice of the title of the Jackson and Sharp Company, before the execution of the bond sued on.

This case is clearly distinguished from *Hervey* v. *Rhode Island Locomotive Works* (93 U. S. 664), where the transaction occurred in Illinois. The contracts and the laws of the respective States which apply to them essentially differ.

In Illinois, it is held that where the vendor of personal property delivers possession to the purchaser under an agreement that the property is to be considered as belonging to the vendor until the payment of the purchase-money, notwithstanding such delivery of possession, such agreement as to the creditors of the purchaser is fraudulent and void. *McCormick et al.* v. *Hadden*, 30 Ill. 370; *Ketcham* v. *Watson*, 24 id. 591; *Thompson* v. *Yeck*, 21 id. 73; *Murch* v. *Wright*, 46 id. 487.

In Missouri, the law of which State must govern this case, such a conditional sale is valid not only as between the parties but as against subsequent *bona fide* purchasers or creditors of the vendee. *Parmlee* v. *Catherwood*, 36 Mo. 480; *Little* v. *Page*, 44 id. 412; *Ridgway* v. *Kennedy*, 52 id. 24; *Robbins* v. *Phillips*, 68 id. 100; *Rogers Locomotive Works* v. *Lewis*, 4 Dill. 158.

There was no waiver of the vendor's rights, nor such laches in asserting them as forfeited its title to the cars. In *Rogers Locomotive Works* v. *Lewis* (*supra*), the notes for the purchase-money were all overdue eighteen months, and the property was still in the possession of the vendee. This was not laches. In the present case the notes were overdue only eight months.

The statute of Missouri on the subject of bailment by way

of loan (1 Wagn. Stat., p. 280) has been construed in *McDermott* v. *Barnum et al.*, 16 Mo. 114, and *Criddles's Adm'r* v. *Criddles*, 21 id. 522. Sect. 5 is peculiar, and may have had some effect upon the mind of the draftsman of the contract between the companies.

Mr. Henry S. Green, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

The correct determination of this case depends altogether upon the construction that must be given to the contract between the Jackson & Sharp Company and the railroad company, against which the defendants below recovered their judgment and obtained their execution. If that contract was a mere lease of the cars to the railroad company, or if it was only a conditional sale, which did not pass the ownership until the condition should be performed, the property was not subject to levy and sale under execution at the suit of the defendant against the company. But if, on the other hand, the title passed by the contract, and what was reserved by the Jackson & Sharp Company was a lien or security for the payment of the price, or what is called sometimes a mortgage back to the vendors, the cars were subject to levy and sale as the property of the railroad company. The statute of the State of Missouri enacts that "no mortgage or deed of trust of personal property shall be valid against any other person than the parties thereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or *cestui que trust*, or unless the mortgage or deed of trust be acknowledged or proved and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of land are, by law, directed to be acknowledged or proved and recorded." 1 Wagn. Stat., c. 35, art. 2, sect. 8. The plain purpose of this statute was to render secret liens upon personal property ineffectual as against purchasers or creditors. The property in this case was in the possession of the railroad company when the levy upon it was made, and the contract under which the company held it was not recorded.

What, then, is the true construction of the contract? The

answer to this question is not to be found in any name which the parties may have given to the instrument, and not alone in any particular provisions it contains, disconnected from all others, but in the ruling intention of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account.

Though the contract industriously and repeatedly spoke of loaning the cars to the railroad company *for hire*, for four months, and delivering them for use *for hire*, it is manifest that no mere bailment for hire was intended. No price for the hire was mentioned or alluded to, and in every bailment or letting for hire a price or compensation for the hire is essential. The amount may not be stipulated. It may be a reasonable compensation or a *quantum valebat*, but the contract must contemplate payment for the use of the thing let or bailed. Not only was no such payment provided for or required, but all intention to demand it is negatived by the strongest implications. The manufacturing company exacted and took promissory notes for the entire selling price of the property, $6,138.40, and, in addition thereto, collaterals to a large amount to secure payment of the notes. The aggregate of the notes was equal to that price; two of them for $1,919.20 each, one payable at sixty days and the other at four months, bearing interest from their date at the rate of ten per cent; and the third note, at four months, being for $2,583, interest at that rate having been added to the principal sum. One of these notes fell due only nine days after the cars were delivered to the railroad company, and both the others before the expiration of four months from the date of the agreement. The notes were to be collected at maturity, and thus it was contemplated that before the end of four months the manufacturing company should have in hand in cash the full value or price of the cars. It is needless to say that all this is totally inconsistent with the idea that the parties intended a mere letting or bailment for hire.

It appears equally clear to us that the contract was not one for a conditional sale. It is true it said the manufacturing company were to hold the three notes as collateral security,

and collect the same at their maturity, and "hold the proceeds when collected for the safe custody and return to the party of the first part, when demanded, of said passenger, mail, baggage, and express cars, delivered to the party of the second part for the term of four months for hire," "the said party of the second part to have the right and privilege to purchase" (the cars) "at any time within the said period of four months, upon payment to the party of the first part, in cash, the sum of $6,338.40, with interest at the rate of ten per cent from the date of the agreement until day of payment, but, until such payment is made in full, the said party of the second part shall have no right, title, claim, or interest in and to said passenger and mail, baggage, and express cars, *except as to their use or hire*, nor any right or authority in any way to dispose of, hire, sell, mortgage, or pledge the same, but that the said cars are and shall remain the property of the party of the first part, to be accounted for by the party of the second part to the party of the first part, and to be redelivered to the party of the first part, when demanded in default of the payment of the aforesaid sum of $6,338.40, with interest as aforesaid, hereinbefore described, anything to the contrary herein contained notwithstanding."

If this were all, it would necessarily be held that a conditional sale was intended. But it is not all. It is quite unmeaning for parties to a contract to say it shall not amount to a sale, when it contains every element of a sale, and transmission of ownership. This part of the contract is to be construed in connection with the other provisions, so that if possible, or so far as is possible, they all may harmonize. Thus construed, it is quite plain these stipulations were inserted to enable the manufacturing company to enforce payment, not of any rent or hire, but of the selling price of the cars for which the company took the notes of the railroad company. They were intended as additional security for the payment of the debt the latter company assumed. This is shown most clearly by the other provisions of the contract. The notes became the absolute property of the vendors. As has been stated, they all fell due within four months, and it was expected they would be paid. The vendors were expressly

allowed to collect them at their maturity, and it was agreed that whatever sums should be collected on account of them should be retained by the vendors for their own use.

No part of the money was to be returned to the railroad company in any event, not even if the cars should be returned. On the contrary, it was stipulated expressly that if the manufacturing company should elect to take the cars into their own possession, which they reserved the right to do in case of default of payment of the notes, the property should be sold, and of the net amount realized from the sale, so much as should be needed to make the amount remaining due and unpaid on the promissory notes, with the interest that might have accrued thereon, should be retained by the manufacturing company, and the surplus, if any, should be paid over to the railroad company.

What was this but treating the notes given for the sum agreed to be the price of the cars as a debt absolutely due to the vendors? What was it but treating the cars as a security for the debt? And why stipulate that the surplus which might be obtained from the sale of the cars, after taking them back, beyond what was needed to pay the unpaid part of the debt, should be paid over to the railroad company, if that company was not the owner of the cars, even while they were in the possession of the other company, and had not even then what may be called an equity of redemption?

In view of these provisions, we can come to no other conclusion than that it was the intention of the parties, manifested by the agreement, the ownership of the cars should pass at once to the railroad company in consideration of their becoming debtors for the price. Notwithstanding the efforts to cover up the real nature of the contract, its substance was an hypothecation of the cars to secure a debt due to the vendors for the price of a sale. The railroad company was not accorded an option to buy or not. They were bound to pay the price, either by paying their notes or surrendering the property to be sold in order to make payment. This was in no sense a conditional sale. This giving the property as a security for the payment of a debt is the very essence of a mortgage which has no existence in a case of conditional sale.

It may be added that the notes were given to the vendors before the cars were delivered. So, also, the collaterals for the notes were taken before the delivery; and when they were taken, the president of the manufacturing company acknowledged he received them, not as additional security for the restoration of the cars at any time thereafter when demanded, but as security for the notes "given in payment" for the cars. This is confirmatory of the construction we have given to the contract. It tends to show that the transaction was a sale by which the ownership passed to the railroad company, the vendors retaining only a lien for the consideration.

It follows, from what we have said, that to protect the cars from seizure and sale by virtue of executions against the railroad company, recording the contract was made necessary by the statutes of Missouri, to which we have referred.

The judgment of the Circuit Court will, therefore, be reversed, and the record remitted with instructions to enter judgment, on the special finding of facts, in favor of the defendants below; and it is

So ordered.

MR. JUSTICE BRADLEY dissenting.

I dissent from the judgment in this case. I think that, in the absence of express law to the contrary, not only has a man the right to make a conditional sale of his property, but that this right is not opposed to sound public policy, and should be fairly and liberally dealt with. The present case was, in my opinion, clearly a conditional sale, and nothing else; and the owners of the property had a right to reclaim it on the terms contained in the agreement. These terms were fair and just; not involving any forfeiture, but providing for a due allowance for every dollar paid, by requiring a sale of the property if the purchase should not go into effect.

WILLIAMS v. BRUFFY.

1. This court, in *Martin* v. *Hunter's Lessee* (1 Wheat. 85), affirmed the constitutionality of sect. 25 of the Judiciary Act of 1789 (1 Stat. 85, re-enacted in sect. 709, Rev. Stat.), which, in certain cases therein mentioned, confers on this court jurisdiction to re-examine upon a writ of error the final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had. The doctrine then asserted, and ever since maintained, cannot be questioned here.
2. That jurisdiction attaches whenever the highest court of a State, by any decision which involves a Federal question, affirms or denies the validity of the judgment of an inferior court, over which it can by law exercise appellate authority, whether the decision, after an examination of the record of that judgment, be expressed by refusing a writ of error or *supersedeas*, or by dismissing a writ previously allowed.
3. This court, when it has once acquired jurisdiction, may, in order to enforce its judgment, send its process to either the appellate, or the inferior, court.

Mr. Enoch Totten presented the petition of the plaintiffs in error, in *Williams* v. *Bruffy* (96 U. S. 176), in error to the Supreme Court of Appeals of the State of Virginia, for such proceedings as will render effectual the judgment of this court.

MR. JUSTICE FIELD delivered the opinion of the court.

The Court of Appeals of Virginia declines to enforce the mandate of this court issued in this case, and the petition of the plaintiffs in error is that this court will take such proceeedings as will render its judgment effectual.

The plaintiffs in error are citizens of the State of Pennsylvania, and in 1866 they instituted an action in the Circuit Court of Rockingham County, Virginia, against the administrator of the estate of one George Bruffy, deceased, who, at the time of his death, was a citizen of Virginia, for the value of certain goods sold by them to him in March, 1861.

The administrator appeared to the action and pleaded the general issue, and certain special pleas, the substance of which was that Pennsylvania was one of the United States, and

that Virginia was one of the States which had formed a confederation known as the Confederate States; that from some time in 1861 until some time in 1865 the government of the United States was at war with the government of the Confederate States; and that by a law of the Confederate States debts to alien enemies were sequestered; that the intestate had paid over the amount claimed in this action to a receiver in those States appointed under that law, and was thus discharged from the debt to the plaintiffs.

To these pleas the plaintiffs demurred; but the demurrers were overruled. The case was then submitted to the court upon certain depositions and an agreed statement of facts. They established the sale and delivery of the goods for which the action was brought; the residence of the plaintiffs in Pennsylvania and of the deceased in Virginia, during the war; the payment by the latter of the debt claimed to the sequestrator of the Confederate government under a judgment of a Confederate court. The Circuit Court of Rockingham County, therefore, gave judgment for the defendant; and the plaintiffs applied to the Supreme Court of Appeals of the State for a writ of *supersedeas* to bring the case before it for review.

In the courts of other States, a *supersedeas* is merely an auxiliary process designed to supersede the enforcement of the judgment of the court below brought up by writ of error for review. But in Virginia it serves a different purpose. "There," says Robinson, in his treatise on the practice in the courts of that State, "the writ of error is never used as a means of removing the judgment of an inferior court before a superior tribunal, except in those cases in which security is dispensed with. In practice, the *supersedeas* is a substitute for the writ of error in all cases in which it is designed that the judgment of the court below shall be *superseded*." Vol. i. p. 660; *White* v. *Jones*, 1 Wash. (Va.) 118; *Burwell* v. *Anderson*, 2 id. 194; *Wingfield* v. *Crenshaw*, 3 Hen. & M. (Va.) 245.

By the law of that State, when application is made to the Supreme Court of Appeals for a writ of *supersedeas*, the court looks into the record of the case, and only allows the writ

when of opinion that the decision complained of ought to be reviewed. Its action upon the record is in effect a determination whether or not it presents a sufficient question for the consideration of the court. If it deem the judgment of the court below "plainly right," and reject the application on that ground, and its order of rejection so state, no further application for the writ can be presented; the judgment of the court below is thenceforth irreversible. So, in effect, its refusal of the writ on that ground is equivalent to an affirmance of the judgment, for the reason that the record discloses no error.

In the present case, the Supreme Court of Appeals denied the writ, stating in its order that it was of opinion that the judgment of the court of Rockingham County was "plainly right." To review this action of the Court of Appeals, — this determination as to the character of the judgment rendered in the Circuit Court, — a writ of error was prosecuted from this court. It was issued to the Court of Appeals, and was returned with a transcript of the record on file in the office of its clerk, properly certified, and the case was elaborately argued here by counsel. We came to the conclusion unanimously that the judgment of the Circuit Court of Rockingham County was erroneous, that the demurrers to the special pleas should have been sustained, and that the plaintiffs should have had judgment upon the agreed statement of facts for the amount of their claim, with interest from its maturity, deducting in the computation of time the period during which the war continued. We accordingly directed that the action of the Court of Appeals of Virginia, in refusing a *supersedeas* of the judgment of the Circuit Court, should be reversed, and that the cause should be remanded to it for further proceedings in accordance with our opinion. The judgment of this court was accordingly certified to that court, and presented to it in April, 1879. In April of the present year that court declined to take action upon our mandate, for reasons embodied in its opinion, at the time entered in its records. That opinion is as follows: —

"VIRGINIA.

"In the Supreme Court of Appeals, held at the State Court House, in the city of Richmond, on Saturday, the twenty-fourth day of April, 1880.

"CHARLES B. WILLIAMS and JAMES D. ARNEST, partners under the firm name of WILLIAMS & ARNEST, Plaintiffs,
against
JASON N. BRUFFY, Administrator of GEORGE BRUFFY, deceased, Defendant.

Upon a mandate from the Supreme Court of the United States.

"This court, having maturely considered the mandate of the Supreme Court of the United States, is of opinion that, according to the true intent and meaning of said mandate, this court is required to grant a writ of error or *supersedeas* to the judgment of the Circuit Court of Rockingham County.

"This court, at a former term, held at Staunton, Virginia, had refused such writ in the same case, being of opinion that the 'said judgment is plainly right.' By such refusal the said judgment of the Circuit Court of Rockingham had become irreversible, and placed beyond the control and jurisdiction of this court. It was at one time a pending cause in this court. There is no mode by which the decision of an inferior court can be reversed here, except upon an appeal allowed or writ of error granted and duly perfected in conformity with the statutes made and provided. If, therefore, the mandate of the Supreme Court of the United States shall be entered on the records of this court, it must be inoperative and of no effect, unless this court shall now grant a writ of error, or writ of error and *supersedeas*, to the said judgment of the Circuit Court of Rockingham County. That judgment was rendered on the 18th of April, 1871. The seventeenth section of chapter 178, Code of 1873, provides that no process shall issue upon an appeal, writ of error, or *supersedeas* to or from a final judgment or decree, if, when the record is delivered to the clerk of the appellate court, there shall have elapsed two years since the date of such final judgment, decree, or order; but the appeal, writ of error, or *supersedeas shall be dismissed whenever it appears* that two years have elapsed since the said date before the record is delivered to such clerk. So that, if the court should now grant the writ of error and *supersedeas*, no process could issue thereon; and if such process

should issue, the writ of error or *supersedeas* must hereafter be dismissed by the express mandate of the statute. It is further provided, except in certain enumerated cases, that a writ of error or *supersedeas* shall not take effect until bond is given by the petitioner in a penalty, and with certain conditions prescribed; and if two years elapse from the date of such final judgment or decree before such bond is given, the appeal, writ of error, or *supersedeas*, shall be dismissed. See sects. 13 and 17, c. 178, Code of 1873. In the present case, the record has not been delivered to the clerk of this court, nor has any such bond been given as is required of the petitioner, nor indeed can be. These considerations are sufficient to show that no writ of error or *supersedeas* can now be granted, or, if granted, it must be dismissed, unless this court is authorized to disregard the plain letter of the statute under which it exercises its appellate jurisdiction. It may be further added, that when this court deems the decision of the inferior court plainly right, and rejects the application for appeal on that ground, no other appeal, writ of error, or *supersedeas* can afterwards be granted by this court in the said case. See sect. 10, c. 178, Code of 1873.

"For these reasons, this court, with the highest respect and consideration for the Supreme Court of the United States, must decline to take any further action with respect to the mandate of said court.

"This entry is made on the record book of this court in conformity with the request and at the suggestion of the counsel for the petitioners.

"A copy. — Teste: GEO. K. TAYLOR, *C. C.*"

The petitioners accordingly pray that this court will take such action as may be proper and needful in the premises to give efficacy to its judgment.

We do not understand that the Court of Appeals intends by its refusal to deny or question the appellate power of this tribunal in cases arising in the State court where the validity of a statute of, or of an authority exercised under, the State is drawn in question, on the ground of its repugnancy to the Constitution and laws of the United States, and the decision is in favor of its validity. Its appellate jurisdiction over the judgments of the State courts in such cases, and other cases mentioned in the twenty-fifth section of the Judiciary Act of 1789 (re-enacted in the Revised Statutes), passed beyond the region of discus-

sion in this court more than half a century ago. As early as 1816, in the celebrated case of *Martin* v. *Hunter's Lessee*, this court, in an opinion of unanswerable reasoning, from the general language of the Constitution, asserted its appellate jurisdiction over the State courts in the cases mentioned in the act. It also showed that the jurisdiction had been sustained in a great variety of cases, and that the doctrine had been acquiesced in by enlightened State courts without a judicial doubt being breathed until that case arose. No doctrine of this court rests upon more solid foundations, or is more fully valued and cherished, than that which sustains its appellate power over State courts where the Constitution, laws, and treaties of the United States are drawn in question, and their authority is denied or evaded, or where any right is asserted under a State law or authority in conflict with them. And in no class of cases could that jurisdiction be more properly invoked than when, by enactments of a revolutionary organization against the government of the United States, the property or the rights of citizens of the loyal States are attempted to be destroyed or impaired because of their loyalty to the Union.

The main reason assigned by the Court of Appeals for declining to act upon our mandate, as seen by its opinion, is the lapse of over two years from the date of the rendition of the judgment of the Circuit Court of Rockingham County, and the delivery of the record to that court. The judgment was rendered on the 18th of April, 1871, and the petition for the *supersedeas* with the record was not presented to the court and delivered to its clerk until the 12th of September, 1874. The Court of Appeals, it is true, in its opinion, states that the record has not been delivered to its clerk; but this is evidently an inadvertence, as the transcript before us shows that such record was filed with him on the day mentioned. The court also adds, as further reasons for its action, that a bond with a certain penalty and prescribed conditions was required to be given within like period before a *supersedeas* could take effect, and that no such bond was given in the case; and also, that when the Court of Appeals deems a decision of the inferior court plainly right, and rejects an application for an appeal on that ground, no other appeal or *supersedeas* can afterwards be granted.

These last two grounds do not impress us as having force, for a bond could not be required until the writ is allowed. And the ground of refusing the writ, that the decision in the inferior court was plainly right, being itself held to be untenable, there could be no reason why the order of denial should not be reversed, and an order granting the writ entered in its place, as in the case of reversals of other orders.

As to the lapse of more than two years between the date of the judgment and the delivery of the record to the clerk of the appellate court, it is sufficient to observe that the Court of Appeals gave no effect to that circumstance; and we could not say it had no authority after that time to look into the record of the inferior court. We could not say what facts may have existed which prevented the operation of the statute, or what proceedings may have been necessary, according to the practice of the court, to enable parties to avail themselves of the lapse of time. The court did not refuse to receive the petition of the plaintiffs in error on the ground that it was presented too late, nor did it afterwards dismiss the petition for that reason. It took jurisdiction of it so far as to examine the record of the judgment of the court below, and to pass upon its character. In its judgment, entered in its records, it states that the petition, "having been maturely considered, and the transcript of the said judgment seen and inspected, the court being of opinion that said judgment is plainly right, doth deny the said *supersedeas*." That judgment, thus entered, is a final determination of the character of the judgment of the inferior court. Although in the form of denying the *supersedeas*, it is not essentially different in its character and effect from a judgment dismissing such writ after it had been once granted and the merits of the case heard. So long as it remains unreversed, it will be authority to all the inferior courts of Virginia that the confiscation of debts due to loyal citizens, under an act of the Confederate government, enforced as a law of the State, was a valid proceeding. It is, therefore, the subject of review in this court. *The Richmond, &c. Railroad Co.* v. *The Louisa Railroad Co.*, 13 How. 71. It is enough for our jurisdiction over the case that there was a final judgment of the Court of Appeals, and our jurisdiction

cannot be now ousted, after we have acted upon the case and passed upon its merits, by any suggestion that that court never took jurisdiction to look into the record of the inferior court and determine the character of its judgment; nor can we listen to any such suggestion in contradiction of the record of the case. In the elaborate argument of counsel of the case before us, though several objections were urged to our jurisdiction, no intimation was made of the want of jurisdiction by the Court of Appeals. *Skillern's Executors* v. *May's Executors*, 6 Cranch, 267; *Ex parte Story*, 12 Pet. 339; *Washington Bridge Co.* v. *Stewart*, 3 How. 413.

Whenever the highest court of a State by any form of decision affirms or denies the validity of a judgment of an inferior court, over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision, if it involve a Federal question, will, upon a proper proceeding, attach. It cannot make any difference whether, after an examination of the record of the court below, such decision be expressed by refusing a writ of error or *supersedeas*, or by dismissing a writ previously allowed. And when this court has once acquired jurisdiction, it may send its process, in the enforcement of its judgment, to the appellate court of the State, or to the inferior court whose judgment is reversed. Had the Court of Appeals, after assuming jurisdiction so far as to examine the record of the inferior court and pass upon its action, granted the *supersedeas* and rendered in the case the judgment which, in our opinion, should have been rendered, the judgment of the inferior court would have been reversed, and judgment ordered in favor of the plaintiffs in error. Having jurisdiction of the case, we can now direct that such reversal be made and such judgment be entered.

But inasmuch as the Court of Appeals finds itself embarrassed in its action upon our mandate by reason of the statute, to which no reference was made in its original decision, we will direct that the mandate be recalled, and that final judgment be entered in this court reversing the judgment of the Circuit Court of Rockingham County, and awarding judgment to the plaintiffs for the amount appearing from the record

and the agreed statement of facts to be due to them on their claim, with interest from its maturity, deducting in the computation of time the period of the war; the judgment to be paid by the defendant as administrator out of the estate of the deceased George Bruffy, in like manner as other claims established against his estate; and it is

So ordered.

PEOPLE'S BANK *v.* CALHOUN.

1. An action pending in a State court cannot be removed to the Circuit Court, by written stipulation, where there is nothing in the latter or the record to show that, by reason of the subject-matter, or the character of the parties, the latter court can take cognizance of it.
2. In a foreclosure suit, the Circuit Court, having jurisdiction of the subject-matter and the parties, appointed a receiver, who, pursuant to its orders, took possession of the mortgaged road. In an action between other parties, subsequently brought in a State court, an attachment was sued out and levied upon the road. Pending an application thereupon made to the Circuit Court, to restrain the plaintiff from further proceeding with his attachment, he and the defendant to the action consented to its removal to the Circuit Court, where, upon a finding that the road was not, at the date of the levy of the attachment, the property of that defendant, the writ was dismissed. *Held*, that the Circuit Court had the right to determine upon the conflicting claims to the possession of the road, and that the parties to the action, by consenting to transfer it, did no more, in effect, than that court might have compelled them to do.
3. The deeds of the defendant transferring his interest in the road to the trustees named in the mortgage and to the railroad company bear date before the attachment against him was sued out. They were thereafter recorded. *Held*, that they were admissible in evidence.

ERROR to the Circuit Court of the United States for the Southern District of Illinois.

The People's Bank of Belville brought an action in the Circuit Court of the county of St. Clair, in the State of Illinois, at its April Term, 1876, against Edward F. Winslow and James H. Wilson, on two promissory notes, on which it alleged that the sum of $40,733.36 was due. At the commencement of the action, the bank, upon filing the requisite affidavit, setting

forth, among other things, the non-residence of the defendants, obtained a writ of attachment, which was levied on the right of way, iron track, &c., of the road known as the Belleville and O'Fallon Railroad, and its appurtenances, situate in that county. During that term the following stipulation, signed by the attorneys of record of the respective parties, was filed: "It is stipulated that on the fifth Monday of the term, or at any subsequent day of the term, this cause shall be removed to the proper Circuit Court of the United States, as by consent, petition, and bond waived; and all defendants agree to file the record of the cause in that court before the first day of the June Term, A.D. 1876, defendants' pleas to be there filed with record." On the said fifth Monday, the court, pursuant to that stipulation, ordered "that this cause be removed to the Circuit Court of the United States for the Southern District of Illinois; and that the clerk of this court certify a transcript of the papers and proceedings in this cause to said court, according to the statute in such case made and provided."

Philo C. Calhoun and George Opdyke, trustees named in the mortgage executed by the St. Louis and Southeastern Railway Company to secure its bonds, filed their bill of foreclosure in the said Circuit Court for the Southern District, Oct. 21, 1874, and the court thereupon appointed a receiver, and put him in possession of the mortgaged property, including that upon which the attachment sued out by the bank was levied.

After the record of the attachment suit was filed in the latter court, Calhoun and Opdyke presented, under a statute of Illinois permitting such a proceeding in attachment cases, a petition of interpleader, alleging that they, as trustees, and not Winslow and Wilson, were the owners of the railroad on which the writ had been levied, and praying that the attachment be dissolved. No defence was made by Winslow and Wilson to the suit against them; and the court rendered judgment against them for the sum due on the notes, and in the record of the judgment was incorporated an order of sale of the attached property. The issue made by the petition of Calhoun and Opdyke was tried some time after this, and judgment rendered in their favor, with an order dismissing or dissolving the attachment. This

latter issue, though triable by jury, was submitted to the court by an agreement waiving the jury.

A bill of exceptions, embracing sixty pages of the printed record, gives the history of this trial, and concludes as follows: —

"And now the court found the said property in said interplea described to be the property of said interpleaders, and that it was not subject to the said attachment, and was not the property of Edward F. Winslow and James H. Wilson at the date of levy of said attachment, but was the property of the interpleaders; to which ruling and decision of the court the plaintiff, by its counsel, at the time excepted.

"And the court ordered said attachment to be dismissed, and to this ruling and decision of the court plaintiff, by its counsel, at the time excepted, and inasmuch as the matters and things above set forth are not of themselves matters of record in said cause, the plaintiff presents this its bill of exceptions, which it prays may be signed and sealed and made part of the record, which is done.

"S. H. TREAT." [SEAL.]

An exception was duly taken to the admission of certain evidence, which is mentioned in the assignment of errors, and stated in the opinion of the court.

The bank sued out this writ, and assigns for error that the court below erred: 1, In assuming and taking jurisdiction of the said cause; 2, In trying said cause and rendering judgment therein; 3, In dismissing the attachment; 4, In finding that the property levied upon by virtue of the attachment was not subject thereto, when it had at a previous term rendered judgment for the amount of the note sued on, and ordered that property to be sold to satisfy the writ; 5, In permitting the deed from James H. Wilson and wife, and Edward F. Winslow and wife, to George Opdyke and Philo C. Calhoun, dated Jan. 4, 1876, and recorded in April, 1876, purporting to convey the property levied on by the attachment, to be read in evidence on the trial of the issue made on the interplea of Opdyke and Calhoun; 6, In permitting the deed from James H. Wilson and Edward F. Winslow, and their wives, to the St. Louis and Southeastern Railway Company (consolidated), dated Jan. 5, 1876, and recorded in April, 1876, purporting to convey

the property levied on by attachment, to be read in evidence on the trial of the issue made on the trial of that interplea.

Mr. Charles W. Thomas for the plaintiff in error.

1. The Circuit Court had no jurisdiction. The removal was by consent, without averring any facts which would authorize it. It must affirmatively appear from the record that the Circuit Court had jurisdiction. *Kennedy* v. *Georgia State Bank*, 8 How. 586; *Dred Scott* v. *Sandford*, 19 id. 393; *Ex parte Smith*, 94 U. S. 455. Mere consent is wholly insufficient to confer it. *The Lucy*, 8 Wall. 307; *Railway Company* v. *Ramsey*, 22 id. 322; *City of New Orleans* v. *Gaines*, 22 How. 141.

The fact that the plaintiff is a corporation of Illinois, and the defendants are non-residents of that State, is immaterial. Citizenship and residence are not synonymous terms. *Robertson* v. *Cease*, 97 U. S. 646.

In a case like this, where the court was without jurisdiction, and its judgment a mere impediment to a proceeding in the proper forum, a plaintiff may procure the reversal of a judgment rendered in his favor, but which is really to his detriment. *Hartmann* v. *B. & O. F. R. R. Co.*, 64 Ill. 24; *Dred Scott* v. *Sandford*, *supra*.

2. At the January Term, 1877, the Circuit Court heard the cause, gave judgment in favor of the bank against the defendants for $43,266.66, and ordered a sale of the property to satisfy it, notwithstanding the interplea of Opdyke and Calhoun, claiming the attached property, was on file. At the next term it tried for a second time the title to the property, and found it to be in Opdyke and Calhoun, thereby not only reversing the former judgment, but denying the bank all recourse on the garnishee given it by the statute. The dismissal of the attachment was a dismissal of the case. This was error. *Bank of the United States* v. *Moss*, 6 How. 31.

3. But even conceding that the Circuit Court had jurisdiction, and that there was no error in its action, as disclosed by the record outside of the bill of exceptions, it erred in admitting in evidence the deed from Winslow and Wilson and their wives to Opdyke and Calhoun, and the deed from the same grantors to the St. Louis and Southeastern Railway Company.

Acknowledged and recorded after the attachment had been levied, they were entirely incompetent and irrelevant as proof of a legal title in the interpleaders superior to the lien of the writ; and in this proceeding that title is the only question at issue. *City Insurance Co.* v. *Commercial Bank*, 68 Ill. 348.

Upon this ground the bank, when the interpleaders had concluded their case, moved the court to find that the property was subject to the attachment. Had a jury been empanelled to try the issue, this would have been equivalent to moving an instruction to them, after the plaintiff had introduced all his evidence, to find the title to be in the defendant. This court will examine the bill of exceptions to ascertain whether in either case the Circuit Court erred in refusing the motion.

If the evidence given by the plaintiff be insufficient to sustain a verdict, so that one based thereon would be set aside, the Court may direct the jury what verdict to render. *Herbert* v. *Butler*, 97 U. S. 319.

Mr. Benjamin H. Bristow and *Mr. William S. Opdyke* for the defendants in error.

MR. JUSTICE MILLER, after stating the case, delivered the opinion of the court.

It has long been the established doctrine of this court that no such exceptions as those taken in this case to the judgment of the court on the facts submitted to it can be inquired of here, under the provisions of the act providing for the mode and the effect of submitting cases triable by jury to the court alone.

There are, however, one or two exceptions to the admission of evidence on the trial which can be and have been assigned for error. A still more important question is raised by the record outside the bill of exceptions, which demands our attention. It relates to the jurisdiction of the case in the United States court as supposed to be acquired by the removal proceedings in the State court, which were founded on the written consent of the bank and of Winslow and Wilson, who were the only parties to the suit.

It needs no citation of authorities to show that the mere consent of parties cannot confer upon a court of the United States

the jurisdiction to hear and decide a case. If this were once conceded, the Federal courts would become the common resort of persons who have no right, either under the Constitution or the laws of the United States, to litigate in those courts.

It is not necessary for us to decide whether a paper may not be drawn up and signed by the parties, which shows on its face that the case, either by reason of the citizenship of the parties or the subject-matter of the litigation, is properly cognizable in a Federal court, and that that court can, on their assent, take jurisdiction either by way of original proceeding or by removal from a State court.

No such case is presented by the agreement for removal found in this record. Nor does it anywhere appear in this record that the parties had the citizenship or the alienage which would authorize the Federal court to entertain jurisdiction of the case.

The record, however, shows that in October, 1874, prior to the beginning of the attachment suit, there was instituted in the Circuit Court of the United States a suit to foreclose a mortgage in which Calhoun and Opdyke, as trustees, were plaintiffs, and in which they procured the appointment of a receiver, who held possession of the railroad under the order of that court at the time the writ of attachment was levied. It is further shown that they made application to the court sitting in chancery to enjoin the bank from proceeding in the State court with its attachment. No disposition seems to have been made of this application, and it is a reasonable inference that the removal of the attachment suit from the State court into the court which had possession by its officer of the property attached was made to avoid the conflict which might have arisen if the cases had proceeded to final judgment in courts of different jurisdictions.

We think this was not only permissible, but that it was the proper course to be pursued in such case. The jurisdiction of the Circuit Court of the United States does not here depend on the citizenship of the parties, but on the subject-matter of the litigation. That was in the actual possession of that court when the State court attempted to levy its writ of attachment on the property. It was for the court having such possession

to determine how far it would permit any other court to interfere with that possession, and what effect it would give to the attempt of another court to seize the property so under its control. A court of equity may punish for a contempt of its authority persons who bring suits against corporations whose property is in the hands of its receiver, and it is the constant practice to ask its permission to institute suits against him when they concern such property.

The bank was attempting in the State court to enforce by judicial sale a rival and conflicting lien to that of Calhoun and Opdyke, who were proceeding in the Federal court to sell the same property under their lien. The latter court had not only obtained jurisdiction of the question of lien prior to the initiation of the bank's suit, but it had taken possession of the property by its receiver. It had thus drawn to itself the subject-matter of the litigation and the right to decide upon the conflicting claims to the possession and control of the road.

These principles are not new in this court. They will be found to be sustained by *Minnesota Company* v. *St. Paul Company*, 2 Wall. 609; *Watson* v. *Jones*, 13 id. 679; *Buck* v. *Colbath*, 3 id. 334; and *Freeman* v. *Howe*, 24 How. 450.

In consenting, therefore, to the voluntary transfer of the litigation from the State court into the Federal court, the parties did no more than what they could have been compelled to do by the injunction of the latter, and what would have been done by such compulsory order if they had not submitted to it by agreement. We do not think that there was error in the court entertaining jurisdiction of the plea of interpleader of Calhoun and Opdyke. *Wiswall* v. *Sampson*, 14 How. 52.

In the progress of the trial the intervenors offered in evidence a deed of trust made by Winslow and Wilson on the fourth day of January, 1876, conveying the railroad in question to Calhoun and Opdyke. Exception was taken to the admission of this deed because the certificate of acknowledgment did not state that the grantors were personally known to the officer taking it, and because the deed did not tend to prove the issue made.

As one of the certificates does state that Wilson and his

wife were personally known to the officer, the objection to its *admissibility* as to these grantors was clearly unfounded in fact. The effect of the deed was for the court to consider afterwards.

As the deed professed to convey the property in controversy by the parties against whom the attachment ran, two months before the writ was issued, it is impossible to hold it to be irrelevant to an issue as to the ownership of the property at the date of the levy of the writ.

Similar objections were made to a deed made by the same grantors to the St. Louis and Southeastern Railway Company, of the fifth day of January, 1876, to which the same answers apply.

What effect should be given to the fact that these deeds were not recorded until after the levy of the bank's attachment we need not inquire, for that proposition does not go to their admissibility in evidence, and its decision depends upon other matters, both of law and evidence, as to which no question is raised by this record.

These are all the assignments of error requiring notice at our hands, and in these we find none.

Judgment affirmed.

ROGERS v. PALMER.

1. A., as attorney for B., procured a judgment by default in favor of the latter against C., of whose insolvency and intent to commit a fraud on the bankrupt law he had knowledge. *Held*, that that knowledge was imputable to B.
2. C. having, with intent to give a preference to B., contributed to the rendition of the judgment at an earlier day than without his aid it could have been rendered, an execution was sued out and levied upon his goods. *Held*, that he thereby procured them to be taken on legal process within the meaning of the thirty-fifth section of the Bankrupt Law of March 2, 1867 (14 Stat. 534), as modified by the act of June 22, 1874. 18 Stat., part 3, pp. 180, 181.

APPEAL from the Circuit Court of the United States for the District of Minnesota.

The facts are stated in the opinion of the court.

Mr. Edward G. Rogers for the appellant.
Mr. Enoch Totten and *Mr. Cushman K. Davis, contra.*

MR. JUSTICE MILLER delivered the opinion of the court.

The complainant is assignee in bankruptcy of Andrew Palmer, Jr., son of the appellee.

The father having procured a judgment against his son in the District Court of Freeborn County, Minnesota, for the sum of $8,433, caused execution to be issued thereon and levied upon the stock of goods of the defendant, who was a merchant in business in the town of Albert Lea, in that county.

Within a few days thereafter, proceedings in bankruptcy were instituted against the son, and he was duly declared a bankrupt. His assignee brought this suit in chancery for the purpose of having the levy declared void as a fraud upon the Bankrupt Act, and the goods, or their proceeds, subjected to administration in the bankruptcy proceeding. After answer, considerable testimony was taken. The Circuit Court dismissed the bill, and he appealed.

The bankrupt was indebted to his father on three promissory notes of several years' standing, and long overdue, on which interest had been paid with tolerable regularity until a year before the bankruptcy. About that time, the father, a resident of Wisconsin, visited the son, who lived in Minnesota, and received a mortgage on some land, but not sufficient in value to secure the debt. In July, 1875, he again visited his son in Albert Lea, and not long afterwards sent the notes for collection to Lovely & Parker, attorneys of that place, who commenced suit by the issue of a summons Oct. 23, 1875, which was served the same day. An affidavit was made, November 5, in the case by Parker, one of the attorneys, on which an attachment was issued and levied on the entire stock of the defendant's goods. In this affidavit Parker stated, without qualification, that the defendant was about to dispose of his property with intent to delay and defraud his creditors.

By the course of procedure in the courts of Minnesota, the plaintiff in that suit was entitled to judgment on the 13th of the month, if no plea or answer was interposed; and none was filed by the defendant.

Two days before this time, however, other creditors of Palmer, hearing of the condition of affairs, came to look after their interests and to prevent this judgment. Before they could initiate proceedings in bankruptcy they filed a bill in equity in the State court, and procured an order enjoining the plaintiff and his attorneys from taking their default and judgment, on the ground that the proceeding was fraudulent and collusive between father and son. This injunction was issued on the 12th; but on the 13th, the first day on which a judgment by default could have been entered in the action at law, it was dissolved on the affidavit of Andrew Palmer, Jr., drawn up by one of the attorneys for his father, denying all the allegations of the bill, and stating that his father's debt was a just and true one, and was due and wholly unpaid to the amount stated in the complaint. Judgment was rendered immediately, and on the same day an execution was levied on the defendant's stock of goods.

In a very few days thereafter the debtor Palmer was duly declared a bankrupt. By agreement the goods were sold, and the money derived therefrom deposited in the bankrupt court, subject to the final decree in this suit, as they would have been if they had not been sold.

There is no question that at the commencement of the action by the father the son was insolvent.

There are many circumstances besides the affidavit made by the son to show that he and his father had a perfect understanding in regard to that suit. Among these are the visit of the father only a few months before it was commenced; the absence of any special reason for suing at that time after eight years' delay, and the giving shortly after of security by mortgage for the debt, though insufficient; the sending of the notes for suit to the attorneys who had been usually employed by the son; the son's moving, as soon as the goods were attached, his books and papers into the office of these attorneys, and his seeming full consultation with them throughout the whole proceeding.

When we come to add to these the voluntary affidavit of the defendant, on which alone the injunction was dissolved, and the father enabled to recover judgment, under which an

execution was issued and a lien secured on all the defendant's goods, we are satisfied that the son actively aided in securing this seizure of them, with a design to prevent the equal distribution of them among his creditors under the proceedings in bankruptcy, which he knew would be commenced in a few days.

Several of these creditors were present when the injunction was dissolved and the judgment rendered. The injunction, as the attorneys and the debtor Palmer knew, was obtained to restrain the prosecution of the action until they could apply to the court in bankruptcy. To delay the rendition of the judgment until the application could be made would be fatal to the preference of the father's debt; for by the bankrupt law the attachment was dissolved when the son was adjudged a bankrupt, and unless execution could be levied before that time the goods would pass to the assignee, relieved of any claim under the judgment.

Whether, therefore, the father should be paid in full to the exclusion of other creditors or not depended on the dissolution of that injunction, and that was obtained solely on the voluntary affidavit of the insolvent son.

We are satisfied that he procured this preference and this taking of his goods on execution with a purpose of defeating the operation of the bankrupt law, within the meaning of the act on that subject. Sect. 35 of Bankrupt Act.

But, in order that the assignee shall recover the value of the goods seized on execution, it is not alone sufficient that the bankrupt should have aided in procuring the seizure. It is also necessary that the creditor should have had reasonable cause to believe that the debtor was insolvent and should have known that a fraud on the Bankrupt Act was intended.

We think this is the result of sects. 35 and 39 of the original bankrupt law, as amended by the act of June 22, 1874, which changed the original act in important particulars, and which, so far as it may conflict with that act, or the revision, must be held to control them both. 18 Stat. part 3, pp. 180, 181.

This latter statute carefully introduces the word *know* instead of *reasonable ground to believe*, in regard to the purpose to commit a fraud on the act.

We have little difficulty in coming to the conclusion that the elder Palmer had reason to believe that his son was insolvent at the time judgment against him was taken and the execution levied. We have already given the reasons for this, to which may be added that his son swears that he wrote to his father, pending negotiation with his other creditors and before the judgment was taken, asking him to consent, with the other creditors, to accept a compromise of fifty per cent for his debts.

It is a little more difficult to say that the father *knew* that the goods were seized with intent to defraud the bankrupt law. Possibly at the moment of the seizure he did not know personally all that his attorneys and his son had done, nor all that they knew. It may be that he supposed his suit would proceed in regular order, without the aid of his son or any act on the part of his attorneys intended to evade the bankrupt law. He may not have known personally that other creditors were on the ground contesting his right to a judgment, and still others on the way to institute bankruptcy proceedings, which, if done before the goods were seized under his execution, would defeat his purpose of securing a prior lien.

But this cannot be said of the attorneys who represented him. One of them had, only a few days before, made oath that the son was about to dispose of his property to delay and defraud his creditors. This, if true, was certainly a fraud on the bankrupt law. Instead of instituting a proceeding in bankruptcy, this attorney swore out an attachment in favor of his client, which would be a fraud on the bankrupt law, by preventing the equal distribution of this debtor's property among his creditors.

These attorneys also procured the debtor to make the affidavit in the injunction suit, with the perfect knowledge that, if they thereby succeeded in dissolving it, their client would seize the goods, and make his debt in preference to all other creditors, though they knew that other creditors were on their way to St. Paul to initiate bankruptcy proceedings. They, therefore, knew and intended that their action in behalf of their client would work a fraud upon the bankrupt law.

Is this knowledge imputable to the appellee in this case?

In *Hoover* v. *West* (91 U. S. 308), a creditor had procured a confession of judgment and a levy on property of his debtor, who was declared a bankrupt within four months thereafter.

The creditor had sent his note to a collection agency in Philadelphia, which forwarded it to their corresponding attorney in Nebraska, where the judgment was taken. The creditor knew nothing of what was done until the money was made by sale of the goods, and had given no direction as to the mode of proceeding, and held no communication with his attorney. This court held that the attorney was the agent in the transaction of the collecting agency and not of the creditor, and that he could not be held to know what the attorney knew in regard to the insolvency of the debtor, and other matters in the case. Three of the judges dissented from this view. But an examination of the opinion will show that all were agreed that if the creditor had sent the note directly to the attorney, the latter would then have been the agent of the creditor, whose acts and whose knowledge, obtained in the course of the employment, would have been the acts and the knowledge of his principal. And such, we think, is the true rule of law.

That the attorneys of the elder Palmer and the son were aware of the insolvent condition of the latter, and were co-operating to have his property seized on execution before the bankrupt law could be enforced, and with intent to defeat its operation on the son's property, we think is quite clear. And this we understand to be a fraud upon the bankrupt law, where the debtor contributes actively to that end. *Wilson* v. *City Bank*, 17 Wall. 473; *Little* v. *Alexander*, 21 id. 500.

The result of these considerations is that the decree of the Circuit Court must be reversed, and a decree rendered for the complainant, in conformity to this opinion; and it is

So ordered.

MR. JUSTICE FIELD dissented.

FINCH v. UNITED STATES.

While the act of July 28, 1868 (15 Stat. 125), was in force, A., the owner of two distilleries, applied to the Commissioner of Internal Revenue for Tice meters for them, and deposited the price with the collector of the proper district to be paid to the manufacturer. The latter delivered them and received the money. In one distillery the meters were not used, and in the other they never worked properly. A. sued the United States for the money so paid. *Held*, that he was not entitled to recover.

APPEAL from the Court of Claims.

The facts are stated in the opinion of the court.

Mr. Nathaniel Wilson and *Mr. Lewis Abraham* for the appellants.

The Solicitor-General for the United States.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is an appeal from the Court of Claims. The case is spread over a large surface in the record, but a very condensed statement of the facts will be sufficient for the purposes of this opinion.

In the years 1868 and 1869 the appellants were distillers, and had two distilleries in Pittsburgh, Pa. The distilleries were designated as 1 and 4. In October, 1868, the appellants made application, in due form, to the Commissioner of Internal Revenue for Tice meters for distillery No. 1, and at the same time deposited with the collector of the district in which the distilleries were situated the sum of $2,050, the price of the meters, to be paid over to the manufacturer when the meters were delivered to them. The meters were delivered, and the money was paid accordingly.

These meters were never used, the distillery having ceased to run long before any one went to make the attachment necessary to utilize them.

In March, 1869, the appellants made a like application for such meters for distillery No. 4, and deposited with the collector $2,100 to pay for them. They were delivered to the distillers in July, 1869, and the $2,100 was thereupon paid to the manufacturer. These meters never worked properly.

There is no proof that they were tested before they were shipped from the manufactory, nor that any officer of the Internal Revenue Bureau was detailed to attach them, or to test them after their attachment, or that their indications were ever in any wise regarded by the storekeeper in making his daily reports, or by the assessor in making his monthly computation of the products of the distilleries.

By the act of July 20, 1868, c. 186 (15 Stat. 125), the commissioner, for the prevention and detection of fraud by distillers of spirits, was "authorized to adopt and prescribe for use such hydrometers, saccharometers, weighing and gauging instruments, or other means for ascertaining the quantity, gravity, and producing capacity of any mash, wort, or beer used, or to be used, in the production of spirits, and the strength and quantity of spirits subject to tax," as he might deem proper.

Under these provisions, orders, regulations, and instructions, covering the subject of the meters in every aspect, were issued by the commissioner. They compelled the distillers to buy and pay for Tice meters, as was done in the case in hand, and left them no choice to do otherwise. One of those regulations was as follows: "Under the provisions of the law the distiller is required to furnish and attach meters at his own expense, and also to furnish all pipes, materials, labor, and facilities necessary to complete such attachment. The first duty of a distiller is, of course, to procure a meter. The manufacturer is not required to furnish the meters on credit, and ought not to be expected to do so. When he ships a meter to a distiller in accordance with the application, the manufacturer is entitled to the pay for it. The law does not require the manufacturer to attach it, but, on the contrary, requires the distiller to attach at his own expense."

Another specified that "the expenses and transportation and attachment of meters, and of changes required to be made in the distillery, are to be paid by the distiller," and "distillers must furnish all lumber and other materials necessary for the attachment of the meter, and such workmen and assistants as may be required." By a circular of June 8, 1871, the commissioner announced substantially that the meters were a failure, and from that time they ceased to be used.

By the act of June 6, 1872, sect. 12, c. 315 (17 Stat. 239), all the provisions of the act of 1868 touching meters were repealed, and the use of meters was thereupon abandoned by law. Upon the passage of this act the commissioner issued a circular advising distillers that "all meters attached to distilleries may be detached," and "that the meters being the property of the distillers, they will be permitted to dispose of them as they may desire."

By this suit the appellants seek to recover from the United States the aggregate of the $2,050 and $2,100 paid by them for the Tice meters as before mentioned.

The appellants insist that there was an implied warranty by the United States that the meters they thus bought would be effectual for the purposes they were designed to accomplish, and that there being a clear breach of this warranty, the United States are liable accordingly.

To this there are two answers: —

1. The meters were solely for the benefit of the United States. The appellants had no interest in their working well. If they had any interest in the result, it was in the other direction.

The sole object of the meters was to prevent or expose frauds by the distillers. If the meters were effectual for these purposes, so much the better for the government. If they were a failure, so much the worse. If the distillers were honest, the success of the meters was to them wholly immaterial. If dishonest, the failure would have helped to make their frauds lucrative, while efficiency might have cut off their fraudulent profits and subjected them to exposure and punishment. The distillers did not pay out a dollar more because the meters were a failure, nor would they have paid a dollar less if the tests thus provided had fully answered the expectations of the government.

In either event the pecuniary result to the distillers, if honest in their business, must have been exactly the same.

The essence of their complaint is that the government found the means lawfully provided to detect their frauds, if they committed any, unavailing, and therefore used none. Their argument implies that, if those means had been effectual and

had been used, they would have been satisfied, and their claim could not have arisen.

Both the proposition and the argument seem to us to involve a palpable solecism. There is nothing in the facts of which any contract relation, express or implied, between them and the government, can be predicated.

2. Regulations established pursuant to law made it obligatory upon the distillers to procure the meters, if they continued to carry on the business. They were required to buy and pay, and did so. The government neither paid nor agreed to pay anything. The purchase of the meters was an incident and burden of the business. The right to engage in the business was not unqualified. It could only be done when authorized by the government, in the mode prescribed. No one was compelled to procure that authorization, but whoever elected to do so took it necessarily *cum onere*, and hence has no right to complain of any condition imposed and assented to, or of anything resulting from it. Certainly no consequence such as that here in question can constitute a cause of action against the United States, any more than would any other expenditure or any other loss arising from the business.

Nor can there be any valid demand against the United States upon the ground of money paid and expended for their benefit. The meters were bought and paid for by the appellants. They chose to give the order and pay the money rather than give up the business. The meters were delivered to them by the manufacturer. They owned them, and still own them. The United States never asserted any claim to them. After their use was finally dispensed with by the government, the distillers had the right, as they still have, to dispose of them according to their discretion. Upon the passage of the act of 1872 a circular from the commissioner notified them accordingly.

Nor is there any foundation for a claim against the United States for money had and received. It is true, their officer received the price of the meters from the appellants; but it was for the manufacturer, and not for the government, and it was paid over, accordingly, upon the delivery of the meters. The officer was a mere conduit for passing the money from one

party to the other. The regulation which prescribed the arrangement was intended to secure certainty and promptitude of payment to the manufacturer, and corresponding promptitude on his part in the delivery of the meters when ordered.

Not a dollar of the funds in question is, or ever was, in the national treasury.

We concur in the views expressed by the Court of Claims.

Judgment affirmed.

RAILROAD COMPANY v. COUNTY OF HAMBLEN.

Where, under a decree to enforce a statutory lien retained by the State upon the property, real and personal, stock, and franchises of a railroad company, the property and franchises were sold, — *Held*, that the property was thereafter subject to taxation under the laws of the State, as immunity therefrom, if possessed by the company, did not pass to the purchaser.

ERROR to the Supreme Court of the State of Tennessee.

This was an action brought by the East Tennessee, Virginia, and Georgia Railroad Company, against the County of Hamblen, Tennessee. The question at issue was as to the liability of the company to pay taxes on the assessed value of that portion of its road which lies in that county.

The Cincinnati, Cumberland Gap, and Charleston Railroad Company was chartered by an act of the General Assembly of Tennessee, approved Nov. 18, 1853, the eighth section of which provides, "That said company shall be, and they are hereby, vested with all the rights, powers, and privileges, and subject to all the restrictions and liabilities, of the Nashville and Louisville Railroad Company, except where otherwise provided for in this charter."

A charter was granted to the latter company Feb. 9, 1840, the fortieth section of which provides, —

"That the capital stock in said company, the dividends thereon, and the roads and fixtures, depots, workshops, warehouses, and vehicles of transportation belonging to the company, shall be for ever exempt from the taxation in each and every of the said States of Tennessee and Kentucky, and it shall not be lawful for either of

the said States, or any corporation or municipal police, or other authority thereof, or of any town, city, county, or district thereof, to impose any tax on such stock or dividends, property or estate: *Provided*, the stock or dividends, when the said dividends shall exceed the legal interest of the State, may be subject to taxation by the State in common with and at the same rate as money at interest or interest thereon, and when the State shall impose a tax on the dividends declared in favor of the stockholders of the company, the tax shall extend only to such proportion of the said dividends and capital stock as the part of the road in that State shall bear to the whole road, from the profits of which the said dividends have arisen, which tax, when imposed, shall be retained by the company out of the dividends and paid to the State; but no tax shall be imposed so as to reduce the part of the dividends to be received by the stockholders below the legal interest of the State."

The company first named borrowed from the State her coupon bonds. To secure their payment, the General Improvement Act of 1852, and the acts amendatory thereof, which authorized the loan, retained a lien therefor upon the property, real and personal, stock, and franchises of the company. The latter failing to pay the interest, a law was passed conferring upon the Chancery Court of Nashville jurisdiction of all questions arising upon loans made under those acts to the various railroad companies. The State filed her bill July 21, 1871, in that court to enforce her lien, and secure the payment of the bonds so advanced to the company. A decree was passed for the sale of the property, which is set out in the opinion of this court. McGhee, the purchaser under the decree, conveyed the property to the East Tennessee, Virginia, and Georgia Railroad Company.

The Circuit Court for the county of Hamblen held that the company was subject to the tax, and entered judgment accordingly, upon the affirmance of which by the Supreme Court the case was removed here.

Mr. George Brown for the plaintiff in error.

Mr. William Y. C. Humes, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This case is, we think, governed by that of *Morgan* v.

Louisiana, 93 U. S. 217. We there held that immunity from taxation was not such a franchise of a railroad corporation as would pass by a sale under a mortgage "on the property and franchises of the company," and that the term "franchises" was not synonymous with "rights, privileges, and franchises," "rights, powers, and privileges," and the like. The Cincinnati, Cumberland Gap, and Charleston Railroad Company was by its charter invested "with all the rights, powers, and privileges" of the Nashville and Louisville Railroad Company; but the statutory lien retained by the State as security for its advances covered only "the property, real and personal, stock, and franchises" of the Cincinnati, Cumberland Gap, and Charleston Company. The decree of the Chancery Court of Nashville provided that if the railroad company itself, or some one or more of its stockholders, should not purchase "the said railroad and all the property, real, personal, and mixed, and the franchises and privileges of said railroad company, for $700,000, payable in the bonds of the State of Tennessee, with the coupons attached of and after Jan. 1, 1871," or sell "the same to other parties . . . under the conditions, liabilities, and restrictions as aforesaid, which are fully set forth in said . . . decree," then the commissioners of the State might sell "all the property and franchises of the . . . company to the best advantage, either at public or private sale." Neither the company nor its stockholders bought under this decree; but C. M. McGhee, for himself and his associates, proposed to the commissioners to pay for the road $300,000 in bonds of the State, with January, 1871, coupons attached; and in his proposal he said, "I expect a full and perfect title to the road, including the State's interest, franchises, and privileges." This proposition was accepted by the commissioners, and the sale, reported to the court, was confirmed by decree in the following words: ". . . which report being seen, heard, and fully understood by the court, and not excepted to, is in all things confirmed; and it appearing to the satisfaction of the court that the sales of the Knoxville and Kentucky and the Cincinnati, Cumberland Gap, and Charleston Railroad, with their property and franchises, have been made by the commissioners in conformity with the previous decrees, it is therefore ordered, adjudged, and decreed

that these said sales be confirmed, and that the commissioners retain the bonds and collect the residue of the purchase-money as the same falls due, and, when the same is fully paid, make title to the purchasers according to the terms of the contract and former decrees of this court. It is further ordered and decreed by the court that the purchasers be at once put in possession of these roads, severally bought by them, with all the property, franchises, and effects so bought by them as aforesaid, and for this purpose, if necessary, the clerk and master is hereby ordered and directed, upon the application of either of said purchasers, to issue a writ of possession, or writs of possession, directed to the sheriff of the several counties in this State through which the roads may run, or in which any part thereof, or of the property sold, may be, directing said sheriff to put the purchasers in possession of such property at once, and make return of his action to this court. It is further ordered, adjudged, and decreed that all the acts of the commissioners in reference to said sales be, and the same are hereby, approved, sanctioned, and ratified by the court."

From this it will be seen that although McGhee in his proposal said, "he expected a full and perfect title to the road, . . . franchises, and privileges," the court, in passing upon the confirmation, treated the sale as of the "property and franchises," "in conformity with the previous decrees," and directed that, when the agreed price was paid in full, the commissioners "make title to the purchasers according to the terms of the contract and former decrees of this court."

In this way, as it seems to us, the title of these purchasers was confined to the property and franchises of the company, notwithstanding the use of the additional word "privileges" in the proposal. The authority to sell embraced only "property and franchises," and the sale recognized by the court as having been made is confined within the same limit. An opportunity was afforded the company itself or its stockholders to discharge the State lien or buy the State's interest, on the payment of $700,000 in State bonds. In that event, the original franchises and privileges of the company were to remain unimpaired or pass to the company's vendee; but if a sale was

made by the State authorities to a third party under the statutory lien, then only the franchises which the lien covered were to be transferred; and those, as we said in *Morgan* v. *Louisiana* (*supra*), were only "the positive rights or privileges, without the possession of which the road of the company could not be successfully worked." The act of Dec. 21, 1870, does not purport to enlarge the State's interest. It simply provided a way in which the statutory lien, as originally retained, could be enforced; and gave authority, upon a sale of "any of the franchises," to transfer and vest in the purchaser "all the rights, privileges, and immunities appertaining to the franchises sold." As in this case only franchises "essential to the operations of the corporation, and without which its road and works would be of little value" (*Morgan* v. *Louisiana*), were sold, the immunity from taxation did not pass as an incident.

Our attention has been called to the case of the *Knoxville & Ohio Railroad Co.* v. *Hicks*, decided by the Supreme Court of Tennessee at its September Term, 1877, but not yet reported in the regular series of reports, as holding that this immunity did pass under a similar sale. We do not so understand that case. There it appears that the Chancery Court of Nashville, acting under the jurisdiction conferred by the act of Dec. 21, 1870, "distinctly adjudged that not only the property of the old company, but all its rights, franchises, privileges, and immunities, as defined by the charter and laws and the decree in the cause, passed to and vested in the new company." Here, on the contrary, the same court adjudged, under the authority of the same act, that only the "property and franchises" passed. The same difference, therefore, exists between these cases that there is between *Humphrey* v. *Pegues* (16 Wall. 244) and *Morgan* v. *Louisiana*, *supra*. In *Humphrey* v. *Pegues*, we held that immunity from taxation did pass under a transfer of "all the powers, rights, and privileges" of a railroad corporation, but, in *Morgan* v. *Louisiana*, that it did not by a transfer of "property and franchises" only.

This disposes of the case, and makes it unnecessary to consider whether the immunity from taxation which the Nashville and Louisville Company had by its charter was granted to the Cincinnati, Cumberland Gap, and Charleston Company,

or whether, if it was, this immunity could be transferred to a purchaser at a sale to enforce the statutory lien retained by the State, even with the aid of the jurisdiction conferred on the Chancery Court of Nashville by the act of Dec. 21, 1870.

Judgment affirmed.

BUCHANAN v. LITCHFIELD.

1. The twelfth section of the ninth article of the Constitution of Illinois, adopted in 1870, declares that "no county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness." Under a statute of that State, approved April 15, 1873, authorizing cities to construct water-works, and for that purpose to appropriate and borrow money, and levy and collect a general tax in the same manner as other municipal taxes may be levied and collected, the city of Litchfield, by her ordinance, authorized and directed the issue of city bonds not exceeding a certain amount to be used for borrowing money for the erection, construction, and maintenance of water-works for the use of the people of that city. Bonds in the form and amount prescribed were accordingly issued, bearing date Jan. 1, 1874. Each recites that it "is issued under authority of an act of the General Assembly of the State of Illinois, entitled 'An Act authorizing cities, incorporated towns, and villages to construct and maintain water-works,' approved April 15, 1873, and in pursuance of an ordinance of the said city of Litchfield, No. 184, and entitled 'An Ordinance to provide for the issuing of bonds for the construction of the Litchfield water-works,' approved Dec. 4, 1873." The said twelfth section is not referred to in the statute or the ordinance, nor does the latter make mention of the city's indebtedness, although at the time of the issue of the bonds it exceeded the constitutional limit. A *bona fide* holder of them brought suit upon the unpaid coupons thereto attached. *Held*, that he was not entitled to recover.
2. Inasmuch as neither the Constitution nor the statute prescribes any mode by which a party dealing with the city can ascertain the amount of her indebtedness, *quære*, if the bonds had contained recitals which could be justly interpreted as amounting to a representation by her constituted authorities, that her indebtedness, increased by the amount of the bonds, did not exceed the constitutional limit, would she, as against a *bona fide* holder of them, be estopped from disputing the truth of such representations.
3. The present case distinguished from others, wherein it was held that certain recitals in the bonds of a municipal corporation were conclusive as to their validity, and its liability to pay them.

4. In determining whether the constitutional limit of the indebtedness of the city had been exceeded by the issue of the bonds, the court permitted — there having been no separate assessment of the property within the city for the preceding year made or required by law — the introduction of the assessments for State and county taxes embracing all taxable property within the county and townships of which the city formed a part, from which, in connection with a map, the location and taxable value of all the property within the limits of the city for that year could be readily ascertained. *Held*, that the evidence, being the best which the law afforded, was properly admitted.

5. *Quære*, Is the city legally bound to refund to the proper parties the money which her authorized agents or officers received and paid into her treasury, as the proceeds of the sale of the bonds.

ERROR to the Circuit Court of the United States for the Southern District of Illinois.

This was an action of assumpsit, brought Nov. 25, 1876, by Alexander Buchanan against the City of Litchfield, Illinois, to recover the amount of certain coupons of which it was admitted that he was the *bona fide* holder for value. The declaration, besides a count upon the coupons themselves, contains the usual counts for money lent and advanced, and for money had and received. The city defended the action upon the ground that the bonds were issued in violation of the Constitution of the State, and that they were consequently void. The court which, by the stipulation of the parties, tried the issue found for the defendant, and the plaintiff sued out this writ.

The legislature of Illinois passed, April 15, 1873, an act entitled "An Act authorizing cities, incorporated towns, and villages to construct and maintain water-works," by the first section of which act it is provided that all cities, incorporated towns, and villages in the State be, and are hereby, authorized and shall have power to provide for a supply of water for the purpose of fire protection and for the use of the inhabitants of such cities, incorporated towns, and villages, by the erection, construction, and maintaining of a system of water-works.

The second section provides that such cities, incorporated towns, and villages may borrow money, and levy and collect a general tax in the same manner as other municipal taxes may be levied and collected, for the erection, construction, and main-

taining of such water-works, and appropriate money for the same.

The city council, the legislative authority of the city, adopted, Dec. 4, 1873, an ordinance in the words following: —

"*An Ordinance to provide for the issuing of Bonds for the Construction of the Litchfield Water-works.*

"Be it ordained by the city council of the city of Litchfield:

"SECT. 1. That in accordance with the power conferred by section second of an act of the General Assembly of the State of Illinois, entitled 'An Act authorizing cities, incorporated towns and villages to construct and maintain water-works,' approved April 15, 1873, the mayor and city clerk are hereby authorized and instructed to issue not exceeding fifty thousand dollars in Litchfield water bonds, which bonds shall be used for borrowing money for the erection, constructing, and maintaining of water-works for the use of the people of said city of Litchfield.

"SECT. 2. That the said Litchfield water bonds shall be of the denomination of five hundred dollars each, shall be dated Jan. 1, 1874, and shall become due twenty years after said date, but may be redeemed at par at any time after the year 1878, notice being given at the Nassau Bank, in the city of New York, six months in advance of the intention so to redeem, and said bonds shall bear interest at the rate of ten per centum per annum, payable semi-annually at the said Nassau Bank in the city of New York."

As required by the charter, the mayor of the city approved this ordinance, and after its adoption he and the city clerk made one hundred bonds of the denomination of $500 each, as follows, differing in the numbering from 1 to 100, inclusive.

"No. ——.] LITCHFIELD WATER BOND. [$500.00.

"CITY OF LITCHFIELD, STATE OF ILLS.

"The City of Litchfield, in the State of Illinois, for value received, promises to pay to Geo. Wm. Ballou or bearer five hundred dollars, in current money of the United States, at the Nassau Bank in the city of New York, twenty years after date, with interest thereon from the date hereof at the rate of ten per centum per annum, which interest shall be payable semi-annually in current money of the United States on presentation at said bank of the coupons hereto annexed: *Provided*, that the said city of Litchfield shall

have the right to pay off and redeem this bond at its par value at any time after the year A. D. 1878, first giving said bank six months' notice in writing of the intention to so redeem.

"This bond is issued under authority of an act of the General Assembly of the State of Illinois, entitled 'An Act authorizing cities, incorporated towns, and villages to construct and maintain water-works,' approved April 15, 1873, and in pursuance of an ordinance of the said city of Litchfield numbered 184, and entitled 'An Ordinance to provide for the issuing of bonds for the construction of the Litchfield water-works,' approved Dec. 4, 1873.

"In testimony whereof, the mayor of said city has hereunto set his hand and caused the corporate seal to be affixed, and the clerk of said city to countersign the same this first day of January A.D. 1874.

"W. S. PALMER, *Mayor.*

"B. S. HOOD, *City Clerk.*"

Coupons for the semi-annual interest were attached to the bonds, and the whole number, amounting to $50,000, were sold by the city for the purposes for which they were authorized. The plaintiff's coupons were due July 1, 1876.

The defendant then proved against the objection of the plaintiff, who insisted that such evidence was not admissible against him as the *bona fide* holder of the coupons, that the city of Litchfield is incorporated under a special law which defines its boundaries; that there was no assessment made of the taxable property within said city for the year 1873, separately, but that the city is within the limits of two municipal townships organized under the township organization laws of the State, one called North Litchfield and the other South Litchfield, each six miles square, and that the taxable property in the city was assessed for State and county taxes in the township in which it was situated and to which it belonged; that the property of the city as assessed for State and county taxes for the year 1873 was $1,400,000, which valuation was ascertained by the following method: —

The assessors of North and South Litchfield returned to the clerk of the county court the lists and value of the property assessed for taxation for the year 1873 in said townships respectively, which lists contained a description of all the lands, lots, and other real estate in said township, with the proper

valuation opposite each tract or lot. With these lists and the plat of the city before him, the clerk was able to ascertain the description and value of all the real estate in the city, and by footing the value of the several lands and lots found within the city limits the aggregate value of all the real estate of the city was ascertained for the year 1873.

By another special law the city of Litchfield is made one school district, called the Litchfield school district. And it is a part of the legal duty of the township to note opposite the name of each owner of personal property assessed for taxation the school district in which he resides. That the assessors of North and South Litchfield for the year 1873 noted opposite the names of the owners of personal property in their township residing within the city limits that they resided in Litchfield school district, and the assessed value of the personal property of the city of Litchfield was ascertained by computing the value of all the personal property assessed for taxation in the school district.

That railroad property and the property of corporations were assessed by the State Board of Equalization, and the whole value of these species of property lying in Montgomery County (in which the city of Litchfield is situated) was certified by the auditor to the county clerk, and the proportion taxable in Litchfield was ascertained by the clerk.

That the assessment thus made by the town assessors of the towns of North and South Litchfield was the only assessment made, or authorized by law to be made, of the property situated in the city of Litchfield for State and county taxes for the year 1873, and which assessment for the purposes aforesaid was the last assessment for State and county taxes previous to the issuing and making of said bonds. That by compiling the assessments thus made the exact amount of the value of taxable property in said city of Litchfield for the year 1873, as assessed for State and county taxes, should be and is ascertained to be the said sum of $1,400,000.

It was proved that the debt of the city of Litchfield on and before the first day of January, 1874, exclusive of the water bonds, was $70,000.

Sect. 12 of art. 9, in force in 1870, of the Constitution of the

State, is in these words: "No county, city, township, school district, or other municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount including existing indebtedness in the aggregate exceeding five per centum on the value of the taxable property therein to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness."

Upon the trial the following questions arose: —

First, Whether said twelfth section of the ninth article of the Constitution of the State of Illinois, by its own force and terms, without appropriate legislation, limited or affected the otherwise lawful power of the city of Litchfield to issue the bonds and coupons, and sell the same to raise money for the construction of water-works according to the provisions of the act of April 15, 1873, and the ordinance of the city of Litchfield No. 184, in relation thereto, so as to render said bonds and coupons void as being in excess of five per cent including existing indebtedness on the value of taxable property in said city as ascertained by the last assessment for State and county taxes preceding the issue of such bonds.

Second, Whether the facts offered in evidence for the purpose of showing the value of taxable property in the city of Litchfield for the year 1873 are competent and sufficient to establish the value of taxable property therein, to be ascertained by the last assessment thereof, for State and county taxes previous to the issue of such bonds.

Third, Whether the said facts tending to prove that the said bonds, including the indebtedness of said city, exceed five per cent on the value of the taxable property of said city at the time they were issued, as ascertained in manner before stated, are admissible or competent as evidence in this case to impair the rights of the plaintiff as the *bona fide* holder of the coupons sued on.

And the opinion of the said judges being opposed upon the questions, the latter were duly certified to this court.

Mr. John M. Palmer and *Mr. Frank Morison* for the plaintiff in error.

The defence relied upon by the city is the nullity of the bonds by reason of her asserted absolute want of power to issue

them. It rests upon the constitutional clause, that "no county, city, &c., *shall be allowed*," &c. The question arises, whether the clause operates *proprio vigore* upon municipal corporations, and imposes an actual limitation upon them, or whether it enjoins a duty upon the legislature, when either creating them or providing for the government and control of such as are already in existence. The sounder view, we submit, is that it requires for its enforcement legislation prescribing, under adequate penalties, the duties of the officers of a municipal corporation and declaring the mode by which those dealing with them may ascertain its indebtedness. None has been enacted.

But, conceding the clause to be self-operating, it does not unconditionally prohibit the city from contracting debts for the purposes enumerated in its charter, or in the act of April 15, 1873. That power is expressly granted, and the limitation upon it taking effect only under certain circumstances, the question as to when it may be lawfully exercised must be necessarily dependent upon the decision of the city council whether they do in fact exist. That body alone has access to the means by which they can be investigated and determined. The passage of the ordinance, so far as innocent third parties are concerned, was a final and authoritative declaration by those who were clothed with authority to make it, that no circumstances existed which precluded the exercise of that power. The bonds issued, whereon the money was raised to carry that ordinance into effect, are, therefore, valid securities in the hands of a *bona fide* holder for value. The city is as effectually estopped by their recitals as if the ordinance had declared in express terms, as it now does virtually and by necessary implication, that, at the time of its passage, her debt, including that thereby incurred, would not be in excess of the prescribed amount.

Under the well-settled rule of this court, that nothing but a total want of power renders this class of securities void in the hands of such a holder, bonds issued without proper formalities, bonds issued contrary to the provisions of the laws authorizing them, bonds fraudulently issued, stolen bonds, the proceeds of which never reached the municipalities issuing them, and bonds declared to be invalid by the courts of the

States in which they were issued, have all been pronounced good here. The municipalities have been held to the payment of them, without regard to any equities which would constitute a good defence against a party who had notice of them. *Commissioners of Knox County* v. *Aspinwall*, 21 How. 539; *Moran* v. *Miami County*, 2 Black, 732; *Mercer County* v. *Hacket*, 1 Wall. 83; *Mayor* v. *Muscatine*, id. 384; *Kennicott* v. *Supervisors*, 16 id. 452; *Supervisors* v. *Schenk*, 5 id. 784; *County of Daviess* v. *Huidekoper*, 98 U. S. 98; *County of Schuyler* v. *Thomas*, id. 169; *County of Callaway* v. *Foster*, 93 id. 567; *County of Scotland* v. *Thomas*, 94 id. 682; *County of Warren* v. *Marcy*, 97 id. 96; *Cromwell* v. *County of Sac*, 96 id. 51; *Commissioners* v. *Bolles*, 94 id. 104; *Commissioners* v. *January*, id. 202.

Marcy v. *Township of Oswego* (92 id. 637) was a suit on bonds issued under the authority of a statute of Kansas, which provided that they should not exceed such a sum as would require a levy of more than one per cent per annum to pay the yearly interest. Each recited that it was issued by virtue of and in accordance with that statute, and in pursuance of and in accordance with the vote of three-fifths of the legal voters of the township. A recovery was resisted, upon the ground that the authorized amount was exceeded; but this court held the bonds to be valid in the hands of a *bona fide* holder, and remarked: "It is to be observed that every prerequisite fact to the execution and issue of the bonds was of a nature that required examination and decision. The existence of sufficient taxable property to warrant the amount of the subscription and issue was no more essential to the exercise of the authority conferred upon the board of county commissioners than was the petition for the election, or the fact that fifty freeholders had signed, &c. These are all extrinsic facts, bearing not so much upon the authority vested in the board to issue the bonds, as upon the question whether that authority should be exercised."

The bonds now in question recite that they are issued under the authority of an act of the General Assembly and pursuant to an ordinance of the city. The cases are not distinguishable in principle. The only difference in point of fact is that the

prohibition in one is declared by statute, and in the other by a constitutional provision. It is hardly necessary to say that a law passed pursuant to the Constitution has, while it remains in force, the same binding efficacy as the Constitution itself.

In *Humboldt Township* v. *Long* (id. 642), which was governed by the same statute, the required notice of the popular election was not given. This court, however, reaffirming the doctrines of *Marcy* v. *Township of Oswego*, ruled, in view of the recitals in the bonds, — and they are not substantially different in effect from those in the present case, — that the township was liable. Unless the vote cast at such an election was in favor of the issue of the bonds, the commissioners were not authorized to order it. Their decision that the election had been duly held, although only inferrible from their order for the issue, was regarded as conclusive. So here, under the statute of Illinois and her Constitution, giving to the latter the broadest effect, it was a condition precedent to the power of the city council that certain facts, peculiarly if not exclusively within its knowledge, should exist, but which a third party had no means of ascertaining. The exercise of the power was a decision by the appointed tribunal that such facts existed. We may therefore insist, in the language of Mr. Justice Strong, that "the bonds are not invalid by reason of their having been voted and issued in excess of the statutory (constitutional) limit." *Wilson* v. *Salamanca* (99 id. 499) is to the same effect, and the decisions here contain nothing in conflict therewith.

If the city had contracted with a party to erect the waterworks, she, after accepting them and enjoying the benefit and protection which they afford, could not set up that the contract entailed upon her a debt in excess of the amount she was allowed to incur. *Union Water Co.* v. *Murphy's Flat Fluming Co.*, 22 Cal. 650; *Whitney Arms Co.* v. *Barlow et al.*, 63 N. Y. 62. The bondholders' case is as meritorious as his, because their money was, in this instance, faithfully applied to the construction and maintenance of those works.

Again, if the city, with a knowledge of her then indebtedness, passed the ordinance, sold the bonds, and received into her treasury the money therefor, can she set up her own fraud to exempt her from liability to pay it? The doctrine of *ultra*

vires has no application to such a case, and she, to the same extent as an individual, is liable for the acts of her servants, who, in their appropriate sphere of duty, are engaged in the transaction of her business.

No assessment of the taxable property of the city of Litchfield was made or authorized to be made in the year 1873, and the value of that property was, therefore, not "ascertained," as provided for in the constitutional provision.

This being so, the remaining evidence shows that the valuation of the towns of North and South Litchfield was ascertained by their assessors; that other officers ascertained the value of the railroad property, and still others that of the school property in a part of the county in which Litchfield is situated; and that, by compiling these different returns, the assessable valuation of the property in the city of Litchfield may be determined.

It is not in evidence that it was the duty of any city officer to so compile these various returns, or that any authorized person ever did so; but the court is now asked to do it, and so far constitute itself a city functionary as to make from these returns an estimate of the taxable value of the then property in the city.

The fact indispensable to make out the defendant's case on this point is the ascertained taxable value of this property in 1873. The evidence shows that it never was ascertained.

Mr. A. L. Knapp, contra.

MR. JUSTICE HARLAN, after stating the case, delivered the opinion of the court.

The first and most important of the certified questions involves the construction of the twelfth section of the ninth article of the Constitution of Illinois.

The words employed are too explicit to leave any doubt as to the object of the constitutional restriction upon municipal indebtedness. The purpose of its framers, beyond all question, was to withhold from the Legislative Department the power to confer upon municipal corporations authority to incur indebtedness in excess of a prescribed amount. The authority, therefore, conferred by the act of April 15, 1873, to incur

indebtedness in the construction and maintenance of a system of water-works, could have been lawfully exercised by a city, incorporated town, or village, only when its liabilities, increased by any proposed new indebtedness, would be within the constitutional limit. No legislation could confer upon a municipal corporation authority to contract indebtedness which the Constitution expressly declared it should not be allowed to incur. *Law et al.* v. *The People ex rel.*, 87 Ill. 385; *Fuller* v. *City of Chicago*, 89 id. 282.

It was proved that the debt of the city of Litchfield on and before the 1st of January, 1874, exclusive of the water bonds, was $70,000.

If, therefore, it appears, by evidence, of which the city may rightfully avail itself, as against a *bona fide* holder for value of the coupons in suit, that the bonds, issued Jan. 1, 1874, created an indebtedness in excess of the amount to which municipal indebtedness is restricted by the Constitution, there would seem to be no escape from the conclusion that the bonds are void for the want of legal authority to issue them at the time they were issued.

To the evidence upon which the city relied as showing such want of authority, objections were interposed by the plaintiff, who insisted that it was not admissible against him, as a *bona fide* holder of the coupons in suit.

That evidence was made the basis of important findings of fact. Introduced for the purpose of showing the value of taxable property within the limits of the city, and the extent of her indebtedness, when these water bonds were issued, it is not, in our opinion, liable to any serious objection. It seemed to be the best proof upon those subjects that the law furnished.

In determining whether the constitutional limit of indebtedness has been exceeded by a municipal corporation, an inquiry would always be necessary as to the amount of taxable property within its boundaries. Such inquiry would be solved, not by information derived from individual officers of the municipality, but only in the mode prescribed in the Constitution; that is, by reference to the last assessment for State and county taxes for the year preceding the issuing of the bonds.

That test was applied in this case. Had there been, under or by competent legal authority, an assessment for that year of taxable property within the city, separately from all other property in the county or township to which the city belonged, such assessment would undoubtedly have been controlling. But there was no such official assessment, in fact, or required by law. There were, however, official assessments for State and county taxes for 1873, embracing all taxable property within the county and townships of which the city formed a part, and from which, in connection with the map of the city, could be readily ascertained the location and taxable value of all property within the corporate limits of the city for that year. The purchaser of the bonds was certainly bound to take notice not only of the constitutional limitation upon municipal indebtedness, but of such facts as the authorized official assessments disclosed concerning the valuation of taxable property within the city for the year 1873.

But in what way was the purchaser to ascertain the extent of the city's indebtedness existing at the time the bonds in question were issued? The extent of that indebtedness was a fact peculiarly within the knowledge of the constituted authorities of the city. It was necessarily left, both by the Constitution and the statute of 1873, to their examination and determination, under the constitutional injunction, however, that no municipal corporation should exceed the prescribed amount of indebtedness. It was, nevertheless, a fact which, so far as we are advised by the record, could not at all times and absolutely, or with reasonable certainty, be ascertained from any official documents to which the public had access. A like difficulty, perhaps, would arise in the case of any municipal corporation, possessing the general power of raising money, by taxation and otherwise, to carry on local government. Its liabilities might frequently vary in their aggregate amount, and at particular periods might be of different kinds, some fixed and absolute, while others would be contingent upon events thereafter to happen. These considerations were, doubtless, present in the minds as well of those who framed the Constitution as of those who passed the statute of 1873.

As, therefore, neither the Constitution nor the statute prescribed any rule or test by which persons contracting with municipal corporations should ascertain the extent of their "existing indebtedness," it would seem that if the bonds in question had contained recitals which, upon any fair construction, amounted to a representation upon the part of the constituted authorities of the city that the requirements of the Constitution were met, — that is, that the city's indebtedness, increased by the amount of the bonds in question, was within the constitutional limit, — then the city, under the decisions of this court, might have been estopped from disputing the truth of such representations as against a *bona fide* holder of its bonds. The case might then, perhaps, have been brought within the rule announced by this court in *Town of Coloma* v. *Eaves* (92 U. S. 484), in which case we said, and now repeat, that "where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, *their recital that it has been*, made on the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal." So, in the more recent case of *Orleans* v. *Pratt* (99 id. 676), it was said that "where the bonds on their face *recite the circumstances which bring them within the power*, the corporation is estopped to deny the truth of the recital."

The cases cited by counsel for the plaintiff do not assert any different doctrines, as will be seen from an examination of those chiefly relied upon. In *Commissioners of Knox County* v. *Aspinwall* (21 How. 539), which was a case of municipal subscription of stock in a railroad company, the statute upon which the subscription there purported to rest made the existence of certain facts essential to the exercise of authority to make the subscription and issue bonds therefor. The bonds,

upon their face, however, recited that they were issued *in pursuance of* the statute, which prescribed the conditions precedent to any subscription, and, therefore, the court said, they imported a compliance with the law under which they were issued. It was, consequently, ruled that the purchaser was not bound to look further for evidence of a compliance with the condition annexed to the grant of the power.

In *Kenicott* v. *Supervisors* (16 Wall. 452), the rule was thus stated: "If an election or other fact is required to authorize the issue of the bonds of a municipal corporation, and if the result of that election, or the existence of that fact, is by law to be ascertained and declared by any judge, officer, or tribunal, and that judge, officer, or tribunal, on behalf of the corporation, executes or issues the bonds, *with a recital that the election has been held or that the fact exists or has taken place*, this will be sufficient evidence of the fact to all *bona fide* holders of the bonds."

In *County of Moultrie* v. *Savings Bank* (92 U. S. 631), the validity of the bonds there in suit was questioned, upon the ground that certain precedent conditions imposed by statute had not been complied with. The bonds, however, recited their issue to be "*in conformity to the provisions*" of the statute which gave the authority to issue them. So, in *Marcy* v. *Township of Oswego* (id. 637), where the statute authorizing a municipal subscription, with the sanction of three-fifths of the voters interested, and the issue of bonds in payment thereof, required particular facts to exist and certain acts to be performed before the right to make the subscription and to issue bonds in discharge thereof could be exercised. The statute contained, amongst other things, a proviso to the effect that the amount of bonds sold by the township should not exceed such a sum as would require a levy of more than one per cent per annum on the taxable property of the township to pay the yearly interest. It appeared that the statute had not, in some of these respects, been complied with; that is, that the conditions had not been performed which the statute required before any subscription should be made or bonds issued. But, adhering to the rule announced in *Town of Coloma* v. *Eaves*, the defence was overruled in favor of a *bona fide* holder for

value, because of the *recital* in the bonds that their issue was "*by virtue of*, and *in accordance with*," the statute, and "*in pursuance of*, and *in accordance with*, the vote of three-fifths of the legal voters of the township."

Returning to the case in hand, it will be observed that the bonds issued by the city of Litchfield contain no recital whatever of the circumstances which, under the Constitution of the State, must have existed before the city could legally incur the indebtedness for which the bonds were issued. They purport, it is true, to be issued under the authority of the act of April 15, 1873, and in pursuance of the ordinance of the city based upon that statute. But that statute does not expressly restrict the exercise of the power to erect and maintain a system of water-works to cases in which the aggregate indebtedness of the city was within the limit which the Constitution declared no municipal corporation should exceed. Nor does the city ordinance recite or state, even in general terms, that the proposed indebtedness was incurred in pursuance of or in accordance with the Constitution of the State, or under the circumstances which permitted the issue of the bonds. Consequently, a recital that the bonds were issued under the authority of the statute, and in pursuance of the city ordinance, did not necessarily import a compliance with the Constitution. Had the bonds made the additional recital that they were issued in accordance with the Constitution, or had the ordinance stated, in any form, that the proposed indebtedness was within the constitutional limit, or had the statute restricted the exercise of the authority therein conferred to those municipal corporations whose indebtedness did not, at the time, exceed the constitutional limit, there would have been ground for holding that the city could not, as against the plaintiff, dispute the fair inference to be drawn, from such recital or statement, as to the extent of its existing indebtedness.

Any different conclusion from that indicated would extend the doctrines of this court upon the subject of municipal bonds farther than would be consistent with reason and sound policy, and farther than we are now willing to go. The present action cannot be maintained, unless we should hold that the

mere fact that the bonds *were* issued, without any recitals of the circumstances bringing them within the limit fixed by the Constitution, was, in itself, conclusive proof, in favor of a *bona fide* holder, that the circumstances existed which authorized them to be issued. We cannot so hold.

Our attention is called by counsel to the exceeding hardship of this case upon those whose money, it is alleged, has supplied the city of Litchfield with a system of water-works, the benefits of which are daily enjoyed by its inhabitants. The defence is characterized as fraudulent and dishonest. Waiving all considerations of the case, in its moral aspects, it is only necessary to say that the settled principles of law cannot, with safety to the public, be disregarded in order to remedy the hardships of special cases.

Whether the city is under a legal obligation to make restitution of the money, obtained without authority of law, that is, to refund to the proper party or parties such sums as were actually received by its authorized agents or officers upon the sale of the bonds, is not a question arising in the present action, which is only for the recovery of the stipulated interest upon such bonds. Upon this point it is not proper at this time, or in this form of action, to express an opinion.

What we have said constitutes a sufficient answer to all of the questions certified to us, and requires an affirmance of the judgment.

Judgment affirmed.

LOUISIANA v. WOOD.

1. A city in Missouri, having lawful power to borrow money and provide for the payment of her debts, issued her bonds for the purpose of raising the means to pay her interest-bearing debt and the expenses of her government. They recite that they are issued under the authority of her charter, and an ordinance pursuant thereto passed Jan. 8, 1867. Although not actually executed until July 16, 1872, they were antedated as of Jan. 1, 1872, for the purpose of evading a law of the State passed March 28, 1872, which enacts that no bond thereafter issued by any county, city, or incorporated town, for any purpose whatever, shall be valid or negotiated until it is registered by the State auditor, and his certificate of such registration indorsed thereon. A., believing that the bonds were what on their face they purported to be, and, therefore, obligatory on the city, bought them in good faith from her authorized agent, and the money paid therefor went into her treasury. *Held*, 1. That the city was in the market as a borrower, and received the money in that character notwithstanding the transaction assumed the form of a sale of her securities, upon which, they being defectively executed, a suit could not be maintained. 2. That A. is entitled to recover the money paid, with interest thereon, from the time the obligation of the city to pay was denied.
2. The power of the city conferred by her charter to borrow money to take up her bonded indebtedness was not repealed by the eleventh section of the act of March 28, 1872, which enacts that "any county, city, or town that desires to place its outstanding indebtedness, under the provisions of this act, may do so by funding the same, and issuing new bonds in lieu of the present ones, upon such terms and bearing such interest, with such length of time to run, as may be agreed upon between the county, city, or town and the holders of its bonds."

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

Upon the facts found by the court below this case is as follows: —

The city of Louisiana, Missouri, had authority in law to borrow money, at any rate of interest not exceeding ten per cent per annum, and to provide for the payment of its debts. On the 8th of January, 1867, an ordinance was passed by the city council creating the office of "city fund commissioner." It was made the duty of this officer to sell the bonds of the city for the purpose of funding or paying the indebtedness of the city, and apply the proceeds to the purchase of outstanding warrants and bonds past due, or not having more than three

years to run. By this ordinance he was limited in his sales to a price not less than ninety-five cents on the dollar of the par value of five-year bonds, and ninety cents for those running ten years. On the 1st of March, 1871, the fund commissioner reported to the city council that the bonded indebtedness of the city was about $150,000, bearing interest mostly at the rate of ten per cent per annum, and that about $100,000 would mature that year, and in the years 1872, 1873, 1874, and 1875. Upon this report an ordinance was passed authorizing the commissioner "to negotiate the bonds of the city for the purpose of raising money to liquidate the city debt, for a period not exceeding fifteen years, and at a rate of discount not exceeding fifteen per cent."

On the 28th of March, 1872, the General Assembly of that State passed "An Act to provide for the registration of bonds issued by counties, cities, and incorporated towns," sects. 4 and 11 of which are as follows: —

"SECT. 4. Before any bond hereafter issued by any county, city, or incorporated town, for any purpose whatever, shall obtain validity or be negotiated, such bond shall first be presented to the State auditor, who shall register the same in a book or books provided for that purpose, in the same manner as the State bonds are now registered, and who shall certify by indorsement on such bond that all the conditions of the laws have been complied with in its issue, if that be the case; and, also, that the conditions of the contract under which they were ordered to be issued have also been complied with, and the evidence of that fact shall be filed and preserved by the auditor; but such certificate shall be *prima facie* evidence only of the facts therein stated, and shall not preclude or prohibit any person from showing or proving the contrary in any suit or proceeding to test or determine the validity of such bonds, or the power of any court, city or town council, or board of trustees or other authority, to issue such bonds; and the remedy of injunction shall also lie at the instance of any tax-payer of the respective county, city, or incorporated town, to prevent the registration of any bonds alleged to be illegally issued or founded under any of the provisions of this act."

"SECT. 11. Any county, city, or town that desires to place its outstanding indebtedness, under the provisions of this act, may do so by funding the same, and issuing new bonds in lieu of the pres-

ent ones, upon such terms and bearing such interest, with such length of time to run, as may be agreed upon between the county, city, or town and the holders of its bonds: *Provided, however*, that the contract for funding, with the terms of the same, shall be assented to by a majority of the qualified voters of such county, city, or town, at a general or special election held therefor, and at least thirty days' public notice of the same shall be published in every paper in the county, city, or town, and when there are none, then by four printed handbills put up in the most public places in every voting precinct in such county, city, or town."

Other sections make special provision for the assessment and collection of taxes to pay the principal and interest of all bonds registered in accordance with the act.

On the 16th of July, 1872, after this act went into effect, the city, for the purpose of raising money to pay its interest-bearing debts and the expenses of its government, caused to be executed by its proper officers, and sealed with its corporate seal, twenty-one bonds, payable to bearer on the 1st of January, 1887, for $1,000 each, with coupons attached for semi-annual interest at the rate of ten per cent per annum. These bonds contained recitals that they were issued under the authority of the charter and the ordinance of Jan. 8, 1867. Although not actually executed until July 16, 1872, the city, "for the purpose of evading the provisions of said registration law, and with the intent to make it falsely appear that said bonds were not subject to the requirements of said law, caused said bonds to be antedated as of the first day of January, 1872, and caused it to be falsely stated in them that they were signed, countersigned, and sealed on the day last named." The bonds thus executed were, without being registered, placed by the fund commissioner in the hands of a respectable stock and bond broker in St. Louis, to sell for the account of the city. On the 25th of August, 1873, the broker and agent sold and delivered to the plaintiff below, now the defendant in error, ten of the bonds at ninety per cent of their face value, and on the 1st of September nine more at the same rate. On the 24th of June he sold to Lewis Dorsheimer one bond, and on the 24th of February, 1874, another to John F. Gibbons, at the same price. The price was in each case paid to the broker in money, the

purchasers all the time being ignorant of the fact that the bonds were actually executed after the registration law went into effect, or that the recitals were not in all respects true. They bought the bonds, and paid for them in good faith, believing them to be what on their face they purported to be, and obligatory on the city. The broker, with the assent of the fund commissioner, retained from the money realized on the sales five per cent on the par value of the bonds sold, for his services, and paid the residue to the commissioner, who, with the sanction of the city council, used part in the payment and redemption of matured bonds, coupons, and warrants of the city, and handed over the rest to the city treasurer. The fund commissioner reported the sales of the bonds to the city council, and charged himself with a sum equal to eighty-five per cent of the par value as the sum realized by him, making no mention of the amount retained by the broker for services. His accounts were examined and approved by the city council, and the bonds, coupons, and warrants taken up by his payments were destroyed. The interest on the bonds thus sold was met in full by the city as it matured until Jan. 1, 1876, when only forty per cent was paid, and on the 1st of July of that year the city declared its purpose not to pay either principal or interest, claiming that the bonds were invalid because not registered.

The bonds bought by Dorsheimer and Gibbons were transferred to the plaintiff. After the city had repudiated its obligation, he offered to return the whole twenty-one bonds, and demanded the repayment of the several sums paid for them. This being refused, the present suit was brought to recover back the money so paid. Upon the foregoing facts the court gave judgment against the city for $18,900, and interest at the rate of six per cent per annum from the time the payment of the interest on the bonds was stopped. To reverse that judgment, the city brought the case to this court, and the error assigned is that the facts found are not sufficient to support the judgment.

Mr. David P. Dyer for the plaintiff in error.

Mr. John D. S. Dryden, contra.

MR. CHIEF JUSTICE WAITE, after stating the facts, delivered the opinion of the court.

That the bonds in question are invalid, is conceded. Such is the effect of *Anthony* v. *County of Jasper* (101 U. S. 693), decided at the last term. It is equally true that the legal effect of the transactions by which the plaintiff and his assignors got possession of the bonds was a borrowing by the city of the money paid for what was supposed to be a purchase of the bonds. As the broker through whom the business was done was the agent of the city and acting as such, the case, so far as the city is concerned, is the same as though the money had been paid directly into the city treasury and the bonds given back in exchange. The fact that the purchasers did not know for whom the broker was acting is, for all the purposes of the present inquiry, immaterial. They believed they were buying valid bonds which had been negotiated and were on the market, when in reality they were loaning money to the city, and got no bonds. The city was in the market as a borrower, and received the money in that character, notwithstanding the transaction assumed the form of a sale of its securities.

The city, by putting the bonds out with a false date, represented that they were valid without registry. The bonds were bought and the price was paid under the belief, brought about by the conduct of the city, that they had been put out and had become valid commercial securities before the registry law went into effect. It would certainly be wrong to permit the city to repudiate the bonds and keep the money borrowed on their credit. The city could lawfully borrow. The objection goes only to the way it was done. As the purchasers were kept in ignorance of the facts which made the bonds invalid, they did not knowingly make themselves parties to any illegal transaction. They bought the bonds in open market, where they had been put by the city in the possession of one clothed with apparent authority to sell. The only party that has done any wrong is the city.

In *Moses* v. *MacFerlan* (2 Burr. 1005), it is stated as a rule of the common law, that an action "lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition." The present action can be

sustained on either of these grounds. The money was paid for bonds apparently well executed, when in fact they were not, because of the false date they bore. This was clearly money paid by mistake. The consideration on which the payment was made has failed, because the bonds were not, in fact, valid obligations of the city. And the money was got through imposition, because the city, with intent to deceive, pretended that the false date the bonds bore was the true one. While, therefore, the bonds cannot be enforced, because defectively executed, the money paid for them may be recovered back. As we took occasion to say in *Marsh* v. *Fulton County* (10 Wall. 676), "the obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

It is argued, however, that, as the city was only authorized by law to borrow money at a rate of interest not exceeding ten per cent per annum, the money cannot be recovered back, because a sale of the bonds involved an obligation to pay interest beyond the limited rate, and the borrowing was, therefore, *ultra vires*. There was no actual sale of bonds, because there were no valid bonds to sell. There was no express contract of borrowing and lending, and consequently no express contract to pay any rate of interest at all. The only contract actually entered into is the one the law implies from what was done, to wit, that the city would, on demand, return the money paid to it by mistake, and, as the money was got under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied. That contract the plaintiffs seek to enforce in this action, and no other.

Again, it was contended that, as the money in this case was borrowed to take up bonded indebtedness, the transaction was *ultra vires*, because the effect of the eleventh section of the act of 1872 was to repeal all earlier laws authorizing the borrowing of money for such purposes. We do not so understand that section. The old power to borrow, which the charter gave, was left unimpaired, but, under this new provision, registered bonds might be issued in place of old ones, if the city

and the holders of the old bonds could agree on terms and the people gave their assent. In this way the holders of old bonds might avail themselves of the special tax which the law of 1872 required should be levied to meet the obligation of all registered bonds; but the city was not prevented from borrowing money to pay old bonds if it saw fit to do so, or if it could not agree on the terms of exchange.

The judgment below was right, and it is consequently

Affirmed.

SIMS v. EVERHARDT.

1 An infant *feme covert*, to whom lands in Indiana were conveyed, executed with her husband, May 20, 1847, a deed in fee therefor, for a valuable consideration paid by the grantee to him. She was, on her petition, divorced from him, Feb. 14, 1870. Within less than two months thereafter she gave due notice of her disaffirmance of the deed, and demanded possession of the lands, which was refused. She thereupon brought suit. *Held*, that, as she did nothing during her coverture to confirm the deed, her notice and suit avoided it.

2. An estoppel *in pais* not being applicable to an infant, she was not estopped from alleging her infancy, by any declaration which, at the time of executing the deed, she made in regard to her age.

APPEAL from the Circuit Court of the United States for the District of Indiana.

This case shows that the complainant was married July 14, 1844, to John B. Sims. She was then a minor less than seventeen years old, having been born Sept. 25, 1828. Her father, April 3, 1845, conveyed to her in fee the tract of land in controversy, and, May 28, 1847, she, joining with her husband, executed a deed therefor to Magdalena Everhardt. The deed, subscribed by her and her husband in the presence of a magistrate, was acknowledged in due form, and the purchase-money paid. Mrs. Everhardt went into immediate possession, paid a mortgage upon the property, paid taxes, continued in possession, and made improvements until her death in 1871. The defendants are her devisees.

When the deed was made, some doubts appear to have been entertained upon the question whether the complainant was then of full age, and to remove them she signed the following statement, which was written on the deed: —

"The above-mentioned Ann M. Sims, before the delivery of the above deed, and before the payment of the above money or any part thereof, voluntarily, and as an inducement to the said Everhardt to consummate the bargain, accept the deed, &c., states and declares that she was twenty-one years of age on the twenty-fifth day of September, A.D. 1846. Signed May 28, 1847, in presence of Sam'l E. Williams.

"ANN M. SIMS."

There is evidence that early in her married life, before the deed was made, she received very ill treatment from her husband; that he insisted upon her selling the place; that he employed threats; that she became afraid of him; that a look from him would make her do almost anything; and that she knew nothing of any arrangement to sell the property until the deed was brought for her to sign in her own house.

On the fourteenth day of February, 1870, the complainant was divorced from her husband, for his own fault. In the month of March next following, or early in April, she disaffirmed her deed to Mrs. Everhardt and demanded possession of the land. Her demand not having been complied with, this suit was brought to set aside the deed, and for an account of the rents and profits of the land, as well as of the amount she is in duty bound to pay to the defendants on account of the purchase-money paid by the grantee, and the mortgage afore said.

The other facts are stated in the opinion of the court. The Circuit Court, upon a final hearing, dismissed the bill. The complainant appealed.

When the deed was executed, the Revised Statutes of 1843 were in force in Indiana. Art. 2, c. 28, contains the following provisions: —

"SECT. 1. Every citizen of the United States is capable of holding lands within this State, and of taking the same by descent, devise, or purchase.

"SECT. 2. Every person capable of holding lands, who may be seised of or entitled to any estate or interest in lands, except idiots, persons of unsound mind and infants, may alien such estate or interest at his pleasure, with the effect and subject to the restrictions and regulations provided by law."

"SECT. 17. The joint deed of the husband and wife, upon complying with the provisions of the fortieth section of this chapter, shall be sufficient to convey and pass the real estate of the wife, but not to bind her to any covenant or estoppel therein."

"SECT. 40. The acknowledgment of the execution of any deed or conveyance by which a married woman releases and relinquishes her dower in any lands conveyed, granted, or assigned by her husband, or by which the husband and wife convey the real estate of the wife, may be taken before any officer herein authorized to take the acknowledgment of deeds, but such acknowledgment shall not be taken by such officer unless he shall first make known to her the contents or purport of such deed or conveyance, and she acknowledge, on a private examination, separate and apart from, and without the hearing of, her husband, that she executed such deed or conveyance of her own free will and accord, and without any coercion or compulsion from her husband, all of which shall be certified by such officer in his certificate of such acknowledgment.

"SECT. 41. Any married woman over the age of eighteen years, and under the age of twenty-one years, may release and relinquish her right to dower in any lands of her husband, sold and conveyed by him, by executing, and acknowledging the execution of, such conveyance, as provided in the last preceding section, if the father or guardian of such married woman shall declare, before the officer taking such acknowledgment, that he believes that such release and relinquishment of dower is for the benefit of such married woman, and that it would be prejudicial to her and her husband to be prevented from disposing of the lands thus conveyed, which declaration, with the name of such father or guardian, shall be inserted as a part of the certificate of the officer taking such acknowledgment."

Mr. William H. Calkins and *Mr. Edwin B. Smith* in support of the decree below.

1. The deed of an infant is merely voidable, and not void, although the grantor be a *feme covert*. This is the rule at common law. *Zouch* v. *Parsons*, 3 Burr. 1794. It has been recognized in this court and in the several States. *Tucker* v.

Moreland, 10 Pet. 58; *Irvine* v. *Irvine*, 9 Wall. 617; 3 Washburn on Real Prop. 559, note 6, citing *Phillips* v. *Green*, 3 A. K. Mar. (Ky.) 11; *Webb* v. *Hall*, 35 Me. 336; and many other cases. It has been repeatedly so declared by the Supreme Court of Indiana. *Doe* v. *Abernathy*, 7 Blackf. (Ind.) 442; *Hartman* v. *Kendall*, 4 Ind. 403; *Pitcher* v. *Laycock*, 7 id. 398; *Johnson* v. *Rockwell*, 12 id. 77; *Chapman* v. *Chapman*, 13 id. 396; *Miles* v. *Lingerman*, 24 id. 385; *Law* v. *Long*, 41 id. 586; and *Scranton* v. *Stewart et al.*, 52 id. 68. The last case fully disposes of every issue in this record, and led to the decree from which this appeal was taken. It has not been overruled or qualified by any later case.

In the absence of any decision by that court, we should suppose the deed of an infant *feme covert*, in which her husband joined, to be good and effective. By marriage, guardianship is terminated. This common-law rule has been declared expressly by statute in Indiana. The Revised Statutes of 1843, sect. 102, c. 35, enact that "the marriage of any female, under guardianship as a minor, to any person of full age, shall operate as a legal discharge of her guardianship, *in like manner as if she had arrived at full age.*" The act of June 9, 1852, sect. 12, c. 4, omits the words italicized, and adds: "And her guardian shall account to the husband of the ward in the same manner as if she had arrived at full age." The Supreme Court of Indiana holds that the guardianship being thus terminated, an infant married to a man of full age can have no guardian. *State* v. *Joest*, 46 Ind. 235; *Ex parte Post*, 47 id. 142. The husband takes the place of the guardian, and the Revised Statutes of 1843, sect. 17, c. 28, art. 2, would seem to empower a married woman of any age to unite with him in making title. It has, however, been held that the section merely authorizes a minor wife to join in a conveyance which might be avoided by her within a reasonable time after attaining her majority. *Scranton* v. *Stewart et al.*, *supra*.

2. The deed being only voidable, Mrs. Sims, if she desired to avoid it, was bound to do so, within a reasonable time after becoming of age; and a period of twenty-one years is not a reasonable time. *Hartman* v. *Kendall*, 4 id. 403; *Law* v. *Long*, 41 id. 599, citing numerous cases, especially *Bool* v. *Mix*,

17 Wend. (N. Y.) 119; *Scranton* v. *Stewart et al.*, *supra*, and cases there cited. Some positive act of disaffirmance is required; silence is affirmance. See above cases, and also *Doe* v. *Abernathy*, 7 Blackf. (Ind.) 442; *Babcock* v. *Bowman*, 8 Ind. 110; *Dearborn* v. *Eastman*, 4 N. H. 441; *Robbins* v. *Eaton*, 10 id. 561; *Emmons* v. *Murray*, 16 id. 385; *Wallace* v. *Lewis*, 4 Harr. (Del.) 75; *Hastings* v. *Dollarhide*, 24 Cal. 195. These cases held that such act of disaffirmance must be done within a reasonable time. *Irvine* v. *Irvine* (9 Wall. 617) calls four years a long time. That period was held sufficient evidence of ratification in *Wallace* v. *Lewis*, *supra;* so was six years in New Hampshire, 10 N. H. 561; 16 N. H. 385; and nine years in New York, 11 Johns. (N. Y.) 539; *Richardson* v. *Boright*, 9 Vt. 368, 371; *Kline* v. *Beebe*, 6 Conn. 494; *Wheaton* v. *East*, 5 Yerg. (Tenn.) 41. *Hartman* v. *Kendall* (4 Ind. 403) declares thirteen years to be an unreasonable delay. These decisions also declare that the question as to what constitutes reasonable time must be determined by the peculiar circumstances of each case.

In this connection we rely upon the statement of Mrs. Sims, subjoined to the deed. We never supposed that she could make her deed effective by merely averring capacity; but the deliberate averment of a fact known to her, but not to her grantee, must operate to shorten the period within which it would be reasonable to permit her to avoid her deed by proof of a different state of things from that so averred. The fact that after 1852 she *might* have brought suit without joining her husband is also an element to be considered. Even if not bound to *sue* while covert, she was bound to disaffirm. Disaffirmance is a preliminary act: a fact vital to be proved and to be seasonably performed. The time for its performance will not be extended by delaying the suit. *Bool* v. *Mix*, *supra*. As the consideration was obtained by her false pretences, it might well be held that she would be barred by an acquiescence extending throughout the time within which she would have been liable to indictment therefor. Neither in civil nor criminal procedure is it a conclusive presumption that a woman acts under the coercion of her husband. The facts in this case rebut that presumption.

The fact of coverture does not excuse an act of positive fraud, such as her signing the false statement appended to the deed. While the law of Indiana gives to married women rights superior to those which they enjoy in some of the other States, it does not release them from the obligations of good faith and common honesty. In *Litchenberger* v. *Graham* (50 Ind. 290), the silence of a woman was held to be a ratification of her husband's sale of her personal property. *A fortiori*, then, will active participation in his fraud greatly shorten the time for disaffirmance, if it does not estop her altogether from repudiating the contract. *Gatling* v. *Rodman*, 6 id. 289; *Barnes* v. *McKay*, 7 id. 301.

3. This is a bill in chancery, brought upon the assumption that the deed was void *ab initio*. Assuming that the title is and always has been in the complainant, it seeks merely to remove therefrom a cloud caused by an alleged fraudulent conspiracy against her, in which the deceased grantee was a participant. Such is the equity which she sets out to establish. It finds no support in the evidence nor warrant in the law as it is expounded and enforced in Indiana.

Since 1852, a married woman's real estate in Indiana has been her separate property.

Mrs. Sims was thereafter, if not before, empowered to file her bill in the Federal or the State court, and make her husband a defendant. This is in addition to and entirely distinct from the right to sue at law given by the State statute. It is incident to chancery jurisdiction, and her failure to resort to it in due time is such laches as will bar her recovery now.

4. Though the chancery *power* of the Federal courts cannot be conferred or restrained by State legislation, yet in exercising it this court will recognize the rules of property established by such legislation, and construe a contract accordingly. *Fairfield* v. *County of Gallatin*, 100 U. S. 47.

Under the statute of Indiana the deed in question was neither void nor absolutely and unconditionally voidable. It passed the present title upon delivery, and became unimpeachable, unless avoided within a reasonable time. Though Mrs. Sims's declaration could not operate to bar a seasonable action of ejectment, it may be held an estoppel in these proceedings.

Bispham, Principles of Equity, 293; 2 Story, Eq. Jur., c. 44, especially sect. 1545, and cases there cited.

Mr. Arthur D. Rich, contra.

MR. JUSTICE STRONG, after stating the case, delivered the opinion of the court.

Assuming, as we think it must be assumed, and as it is certainly held in Indiana, that the deed of Mrs. Sims, in which her husband joined, though made during her minority, was not void as against her, but only voidable, and hence that it was incumbent upon her to disaffirm it within a reasonable time after she came of age, the inquiry is still to be met, What was a reasonable time under the circumstances of the case? She gave notice of her disaffirmance almost immediately after she became *discovert*, — certainly within less than two months. This was, however, a little more than twenty years after she attained her majority.

The Circuit Court dismissed the complainant's bill for the reason that it did not appear she had disaffirmed the deed of May 28, 1847, within a reasonable time after the attainment of her majority, being of opinion that the rule was established in Indiana she must have so disaffirmed it, notwithstanding her coverture; that is, in the same time as if she had been *discovert.*

We find no decision of the Indiana courts that ought to be regarded as establishing that rule. The case relied upon by the appellees in support of the judgment of the Circuit Court is *Scranton* v. *Stewart*, 52 Ind. 68. The facts of that case, it must be admitted, were in some respects like those of the present, though in others essentially different. The plaintiff was at the time of her marriage an infant, aged sixteen. She was then seised in fee-simple of a tract of land, containing forty-five acres, and also of an undivided interest in another tract. On the second day of March, 1864, when she was in the nineteenth year of her age, she and her husband conveyed the lands to one George W. Stewart, for a consideration of $2,500, a considerable part of which was paid. Mrs. Scranton came of age on the 12th of January, 1867, gave notice to Stewart of her disaffirmance of the deed on the 22d of July,

1870, and shortly after brought her action to recover the land. This was more than three years and a half after she had attained her majority. The Supreme Court held that her disaffirmance was in time. It was all the case required. But the judge went on to declare that a married woman who has made a deed of her lands during her infancy and coverture must disaffirm it within a reasonable time after she arrives at age, notwithstanding her coverture, and that the fact of the continued coverture would not extend the time for the disaffirmance. All this was *obiter*. It had nothing to do with the case before the court. Nothing in the facts or the judgment required the assertion of such a rule. And it is observable that it was said in a case in which it appeared the married woman was seised of her land before her marriage, and that she was married in 1864, after the statutes of the State had greatly enlarged the power of a *feme covert* over her property. Those statutes had given her the rights of a *feme sole* in regard to her lands, and empowered her to sue as such without joining her husband. They had denied to a husband the rights which at common law he acquired in the wife's property by the marriage. They had made her lands and the profits of them her separate property, as fully as if she was unmarried, with the single exception that she could not incumber or convey them except by deed in which her husband should join. The effect of the State statute, touching the marriage relation and the liabilities incident thereto, was in part considered in *Miles* v. *Lingerman* (24 id. 385), where it was said by the Supreme Court of the State: "Under our present statute the wife may bring her action in regard to her own estate as though she were a *feme sole*. Still our legislature has seen proper to continue the protection formerly accorded to her as a *feme covert*, although as to her power to disaffirm her contracts made during minority her legal disability has been removed. She has the legal power to disaffirm her contracts made during infancy, and to bring her action without the assent, and even against the will, of her husband." This language, if not a positive assertion of its converse, contains at least a strong implication that her power to disaffirm a conveyance made by her during infancy did not exist at common law, or before the statutes of 1847 and 1852 were enacted.

We find nothing in any prior decision of the Indiana courts that sustains what was said *obiter* in *Scranton* v. *Stewart*. *Law* v. *Long* (41 Ind. 586), to which reference has been made, decided that the deed of a minor, conveying her land for a valuable consideration, is voidable only and not void, and that the right to avoid it on coming of age is a personal privilege of the minor and her heirs. It also decided that when the act of an infant is executed, as when a deed has been made and delivered, the infant must, on attaining full age, do some act to disaffirm the contract, and that such act must precede the commencement of an action. But the case did not define what is a reasonable time, or rule that if the wife came of age during coverture she was bound to disaffirm the contract notwithstanding her coverture, as if she was a *feme sole*. In that case the conveyance was made by the wife and her husband before the act of 1852 was passed. He died in 1852. She married again in 1853, and came of age in 1854. Her second husband died in 1864, and she married a third time in 1868. It was not until after her third marriage that her suit was brought. She had been *discovert* during more than four years after her deed was made, and after she had reached her majority, and yet she had taken no step or done any act to disaffirm the deed prior to the institution of her suit. No intimation is given in the case that she was bound to disaffirm or could disaffirm during her coverture. Nothing, therefore, in *Law* v. *Long* supports what was said, but not decided, in *Scranton* v. *Stewart*.

But if the law was accurately stated in the opinion given by the court in *Scranton* v. *Stewart*, as applicable to a deed of her lands made by an infant *feme covert* after the statute of 1852, it by no means follows that it should rule the present case. There is a radical difference in the facts of the two cases. Mrs. Sims was married before the act of 1852 or that of 1847 was passed, and while the common law relative to the marriage relation existed. By the marriage her husband acquired a vested freehold interest in her lands, and became entitled to the rents and profits. His control over the usufruct thereof became absolute. His interest extended during their joint lives, or at least as long as the marriage relation continued. It was an interest capable of sale. When, therefore, the deed

was made to Mrs. Everhardt in 1846, it gave to the grantee the wife's right, subject to disaffirmance, and the husband's right to the possession and enjoyment of the profits absolutely. When the wife subsequently came of age, she continued powerless to disturb the possession of the grantee, as long as her coverture lasted; for the grantee held not only her right, but that also of her husband. The most she could have done was to give notice that she would not be bound by her deed. Was she required to do that? To answer the question it is important to keep in mind her condition at common law. The land was not her separate estate, such as the wife had in *Scranton* v. *Stewart*. In regard to it she was *sub potestate viri*, incapable of suing or making any contract without her husband's assent. She could not even receive a grant of land if her husband dissented. Her disability during her coverture was even greater than that of an infant, and it is settled that an infant cannot disaffirm his deed while his infancy continues. *Zouch* v. *Parsons*, 3 Burr. 1794; *Roof* v. *Stafford*, 7 Cow. (N.Y.) 179. The reason is that a disaffirmance works a reinvestiture of the estate in the infant, and he is presumed not to have sufficient discretion for that. Why should not the greater disability of coverture be attended with the same consequences? If a wife cannot contract about any land which is not her separate property, how can she, without the concurrence of her husband, do any act, the effect of which is to transfer the title to land from another to herself?

We are not, however, called upon by the exigencies of this case to decide that a wife cannot, during her coverture, disaffirm a deed which she made during her infancy. The question now is, whether Mrs. Sims did disaffirm her deed within a reasonable time after she attained her majority. What is a reasonable time is nowhere determined in such a manner as to furnish a rule applicable to all cases. The question must always be answered in view of the peculiar circumstances of each case. *State* v. *Plaisted*, 43 N. H. 413; *Jenkins* v. *Jenkins*, 12 Iowa, 195, and numerous other cases. It must be admitted that generally the disaffirmance must be within the period limited by the Statute of Limitations for bringing an action of ejectment. A much less time has in some cases been

held unreasonable. It is obvious that delay in some cases could have no justification, while in others it would be quite reasonable.

Now, in this case, though there was no disaffirmance for nearly twenty-one years after Mrs. Sims attained her majority, there were very remarkable reasons for the delay, sufficient, in our opinion, to excuse it. When the deed was made she was laboring under a double disability, — infancy and coverture. Even if her deed and that of her husband had not conveyed his marital right to the possession and enjoyment of the land, she would have been under no obligation, imposed by the Statute of Limitations, to sue until both the disabilities had ceased; that is, until after 1870. It is an acknowledged rule that when there are two or more coexisting disabilities in the same person when his right of action accrues, he is not obliged to act until the last is removed. 2 Sugden, Vendors, 103, 482; *Mercer's Lessee* v. *Selden*, 1 How. 37. This is the rule under the Statute of Limitations. But Mrs. Sims could not sue until after her divorce, and until the right the husband acquired by his marriage terminated. And had she given notice during her coverture of disaffirmance of her deed, it was in the power of her husband to disaffirm her disaffirmance. 2 Bishop, Married Women, sect. 392. Giving notice, therefore, which was all she could do, would have been a vain thing. The law does not compel the performance of things that are vain. Mr. Bishop, in his work to which we have referred, says that if an infant, who is also a married woman, makes an instrument voidable because of her infancy, the disability of coverture enables her to postpone the act of avoidance to a reasonable time after the coverture is ended. Sect. 516. In support of this he refers to *Dodd* v. *Benthal*, 4 Heisk. (Tenn.) 601, and *Matherson* v. *Davis*, 2 Coldw. (Tenn.) 443. These cases certainly sustain the rule stated in the text. In the former it was decided that an infant, who is also a married woman, has the option to dissent from her deed within a reasonable time after her discoverture, though her coverture may continue more than twenty years. And if this were not so, the disability of coverture, instead of being a protection to the wife, as the law intends it, would be the contrary. We have

found no decision that is in conflict with this doctrine, and no dicta even, except those in *Scranton* v. *Stewart*. And why should the rule not be thus? The person who takes a deed from an infant *feme covert* knows that she is not *sui juris*, and that she will be under the control of her husband while the coverture lasts. He is bound to know, also, that she has the disability of infancy. He assumes, therefore, the risk attending both those disabilities.

But the continued coverture of Mrs. Sims, after she attained full age, is not the only circumstance of importance to the inquiry whether she disaffirmed her deed within a reasonable time. The circumstances under which the deed was made are to be considered. There is evidence that she was constrained by her husband to execute the deed; that his conduct toward her was abusive, violent, and threatening, in order to induce her to consent to the sale; that she was intimidated by him; that a look from him would make her do almost anything, and that she was in a weak and nervous condition. It is not strange that a woman bound to such a husband should delay during her coverture disaffirming a contract which he had forced her to make.

Add to this, that she had very little opportunity to disaffirm until after her divorce. Before she had reached her majority she removed to another State, and never returned to the neighborhood of the property to reside. Between 1848 or 1849 and 1870 she made but two visits to Laporte, both on account of sickness or the death of a relative, and neither visit was prolonged beyond three days. It is not a case, therefore, of standing by after she came of age and seeing her property in the enjoyment of another.

And again, she never did any act after her deed was made and after she came of age expressive of her consent to it or implying an affirmance of the contract. The most that is alleged against her is that she was silent during her coverture. But silence is not necessarily acquiescence.

We are aware that the decisions respecting the disaffirmance of an infant's deed are not in entire harmony with each other. While it is generally agreed that the infant to avoid it must disaffirm it within a reasonable time after his major-

ity is attained, they differ as to what constitutes disaffirmance and as to the effect of mere silence. Where there is nothing more than silence, many cases hold that an infant's deed may be avoided at any time after his reaching majority until he is barred by the Statute of Limitations, and that silent acquiescence for any period less than the period of limitation is not a bar. Such was in effect the ruling in *Irvine* v. *Irvine*, 9 Wall. 617. See also *Prout* v. *Wiley* (28 Mich. 164), a well-considered case, and *Lessee of Drake* v. *Ramsey*, 5 Ohio, 251. But, on the other hand, there appears to be a greater number of cases which hold that silence during a much less period of time will be held to be a confirmation of the voidable deed. But they either rely upon *Holmes* v. *Blogg* (8 Taunt. 35), which was not a case of an infant's deed, or subsequent cases decided on its authority, or they rest in part upon other circumstances than mere silent acquiescence, such as standing by without speaking while the grantee has made valuable improvements, or making use of the consideration for the deed. We think the preponderance of authority is that, in deeds executed by infants, *mere* inertness or silence, continued for a period less than that prescribed by the Statute of Limitations, unless accompanied by affirmative acts, manifesting an intention to assent to the conveyance, will not bar the infant's right to avoid the deed. And those confirmatory acts must be voluntary. As we have said, one who is under a disability to make a contract cannot confirm one that is voidable, or, what is the same thing, cannot disaffirm it. An affirmance or a disaffirmance is in its nature a mental assent, and necessarily implies the action of a free mind, exempt from all constraint or disability.

In view of these considerations, our conclusion is that Mrs. Sims, the complainant, having been a *feme covert* until 1870, and never having done, during her coverture, any act to confirm the deed which she made during her infancy, could effectively disaffirm it in 1870, when she became a free agent, and that her notice of disaffirmance and her suit avoided her deed made in 1847.

The remaining question is whether she is estopped by anything which she has done from asserting her right to the land

in controversy. In regard to this very little need be said. It is not insisted that she did anything since she attained her majority which can work an estoppel. All that is claimed is that when she made her deed she asserted that she was of age and competent to convey. We are not, therefore, required to consider how far a married woman can be estopped by her acts when she has the single disability of coverture. The question is, whether acts and declarations of an infant during infancy can estop him from asserting the invalidity of his deed after he has attained his majority. In regard to this there can be no doubt, founded either upon reason or authority. Without spending time to look at the reason, the authorities are all one way. An estoppel *in pais* is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity. *Brown* v. *McClune*, 5 Sandf. (N. Y.) 224; *Keen* v. *Coleman*, 39 Pa. St. 299. A conveyance by an infant is an assertion of his right to convey. A contemporaneous declaration of his right or of his age adds nothing to what is implied in his deed. An assertion of an estoppel against him is but a claim that he has assented or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed.

It is, however, unnecessary to dilate upon this branch of the case. The judgment of the Circuit Court was not rested upon any estoppel of the complainant.

Our conclusion upon the whole matter is that the complainant was entitled to the decree for which she asked. The decree will be reversed, and the record remitted with instructions to enter a decree in accordance with this opinion; and it is

So ordered.

HAWLEY v. UPTON.

A., by his bond, acknowledged the receipt from an insurance company of ten shares of its capital stock, and agreed to pay $200 therefor, in instalments, — one-fourth on the receipt of the stock certificate, and the remainder in three equal amounts at three, six, and nine months from Jan. 7, 1871, the date of the bond. He paid on executing it $25, and his name was entered as a stockholder on the books of the company. The certificate was not delivered or demanded. In 1872, the company became bankrupt. *Held*, that the assignee is entitled to recover of A. the unpaid instalments.

ERROR to the Circuit Court of the United States for the District of Iowa.

This is an action brought July 25, 1873, by Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company of Chicago, Ill., to recover from Theodore Hawley the unpaid instalments alleged to be due on his contract to subscribe to the capital stock of that company.

The court, the case having been submitted to it upon the pleadings and proofs without the intervention of a jury, found the following facts: —

"The plaintiff is assignee in bankruptcy, as alleged in the petition.

"On the second day of January, 1871, Rossitur, agent of the Great Western Insurance Company, requested the defendant to take stock in said company.

"The defendant, on certain representations by Rossitur, signed the following paper or bond: —

"'No. —.] THE GREAT WESTERN INSURANCE COMPANY. [$200.
[Stamp.]

"'Capital stock $500,000, with liberty to increase to $5,000,000. Stock non-assessable.

"'Organized July 20, 1857, under act of legislature approved March 4, 1857.

"'Know all men by these presents, that for and in consideration of ten shares of the capital stock of the Great Western Insurance Company of Chicago, Ills., received by me, I am held and firmly bound, and agree to pay the Great Western Insurance Company of Chicago the sum of two hundred dollars in instalments, as follows:

twenty-five per cent thereof upon receipt of stock certificate, twenty-five per cent in three months from date hereof, twenty-five per cent six months from date hereof, twenty-five per cent nine months from date, with interest ten per cent after due.

"'CHICAGO, 7th Jan'y, 1871.

"'THEO. HAWLEY. [SEAL.]

"'Signed and delivered in presence of'—

"At the time the said bond or paper was issued to Hawley the latter paid Rossitur twenty-five dollars, and delivered to him the bond. It was not delivered on any particular conditions. It was delivered to an agent of the company's, namely, the said Rossitur.

"The company afterwards came into possession of the bond, and entered Hawley's name on their books as a stockholder, and published him in their publications as one of their stockholders, Hawley having no knowledge of the publications. Hawley paid no other money, and no calls were made upon him prior to the bankruptcy.

"No certificate of stock was ever sent or delivered to Hawley, and he made no demand on the company for any certificate of stock.

"The bankruptcy of the insurance company was caused by fire in October, 1871.

"The defendant signed no subscription paper or any other paper than the bond above set out.

"On the foregoing facts and the pleadings judgment was rendered for the plaintiff. The judges were opposed in opinion on the following questions: —

"1st, Whether the delivery of a stock certificate under the above circumstances was necessary to constitute the relation of stockholder between the defendant and the insurance company.

"2d, Whether the above facts constitute a defence to the action.

"The judges being divided in opinion on the above questions, hereby certify such division to the Supreme Court, pursuant to the statute in such case made and provided."

Mr. Galusha Parsons for the plaintiff in error.

Mr. C. C. Nourse, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

It cannot be doubted that one who has become bound as a subscriber to the capital stock of a corporation must pay his subscription if required to meet the obligations of the corporation. A certificate in his favor for the stock is not necessary to make him a subscriber. All that need be done, so far as creditors are concerned, is that the subscriber shall have bound himself to become a contributor to the fund which the capital stock of the corporation represents. If such an obligation exists, the courts can enforce the contribution when required. After having bound himself to contribute, he cannot be discharged from the obligation he has assumed until the contribution has actually been made, or the obligation in some lawful way extinguished.

These are elementary principles. *Upton, Assignee*, v. *Tribilcock*, 91 U. S. 45; *Webster* v. *Upton*, id. 65. The only question we have to consider is whether, from the facts found, it appears that Hawley, the plaintiff in error, had become an accepted subscriber to the stock of the company before the bankruptcy. There can be no doubt that he was approached by an agent of the company with a view of securing him as a subscriber. It is equally true that after the representations made to him he was willing to become a stockholder. The result was that he executed the paper set out in the findings, by which he acknowledged the receipt from the company of ten shares of its stock, and agreed within the time named to pay to the company $200, or twenty per cent of its par value. As the company could not sell its stock at less than par, what was done amounted in law to a subscription for the stock, and nothing else. It is true the stock he took purported to be non-assessable; but that in law could only mean that no assessment would be made beyond the percentage he had specially bound himself to pay, unless the legal liabilities of the company required it. *Upton, Assignee*, v. *Tribilcock*, *supra*.

The paper he signed was delivered to the company by the agent who got it. That it was accepted by the company as a subscription is shown conclusively by the fact that his name was entered on the books as a stockholder and publication

made accordingly. It matters not that he had no knowledge of such a publication. His receipt for the stock was an acknowledgment, so far as he was concerned, that he had become a stockholder, and, after an acceptance by the company, his liability was fixed whether any publication was made or not. The publication is only important as a means of showing that his subscription made to an agent had been accepted and ratified by the company. The entries on the books had the same effect. The publication only made it more notorious. The ultimate fact to be established is that a subscription had not only been made by Hawley, but accepted by the company.

Both in the pleadings and the argument the defence was put principally on the fact that no certificate of stock had been issued. It may be conceded that if a suit had been brought by the company on the express promise to pay the twenty per cent, there could have been no recovery without a tender of the certificate; but that is not this case. Here the creditors of the bankrupt company are proceeding against Hawley as a stockholder, to compel him to contribute to the fund which the law had provided for their security, what he by his subscription agreed he would pay. The suit is not brought on his special agreement to pay the twenty per cent, but on his general liability as a subscriber to pay for his stock whenever it was wanted to meet the liabilities of the company. As the certificate was not needed to perfect the subscription, its non-delivery cannot stand in the way of a recovery in this action.

We have no hesitation in answering each of the questions certified in the negative, and the judgment is consequently

Affirmed.

LANAHAN v. SEARS.

1 Where a party, on receiving an absolute deed, covenants with his grantor to reconvey the lands, when the money which it was given to secure shall be paid, both instruments must be taken together as constituting a mortgage.

2. The mortgagee of a homestead in Texas cannot maintain ejectment therefor, if the "forced sale" thereof be prohibited by the Constitution of the State which was in force at the date of the mortgage.

APPEAL from the Circuit Court of the United States for the Western District of Texas.

This was a suit in equity by James E. Sears and Clara Sears, against Samuel J. Lanahan.

The case made by the bill is, in substance: The complainants were married in November, 1869, and thereafter lived, and still live, in Texas, said James since his marriage having been, under the Constitution and laws of that State, the head of a family. In May, 1870, they purchased certain improved lots in Waco, Texas, and he thereupon took possession of them, and has, as the head of a family, and with his wife, ever since occupied them as their homestead. He was engaged in business, and became indebted to the firm of Lanahan & Son, of Baltimore, to whom he gave his promissory notes, aggregating $7,858.19. They were not paid, and the firm pressing for payment, or security, he and wife, to obtain time and to prevent legal proceedings, made, May 2, 1873, an absolute deed — which was duly acknowledged and recorded — of the lots to one Robertson, agent of the firm. Though made to him, it was really for the benefit of the firm, and there was executed and delivered, contemporaneously therewith, a writing by him, which sets forth that the deed was made for the purpose of securing the notes.

Notwithstanding the deed, the complainants continued to occupy the homestead. It was subsequently conveyed, without consideration, by Robertson to one Fort, who conveyed it in the same way to Samuel J. Lanahan, a member of the firm. He holds the same for its benefit, and, the notes being due and unpaid, brought ejectment, Dec. 20, 1875, in the court

below, to try the title to, and recover the possession of, the lots, making only said James a party defendant.

The bill avers that the deed of May 2, 1873, and accompanying agreement, constitute a mortgage upon the homestead which cannot be judicially enforced, and that, if the judgment be recovered, the complainant Clara will be wrongly deprived of her homestead. An injunction is prayed for, restraining Lanahan from the further prosecution of his suit.

The defendant's demurrer to the bill having been overruled, and he declining to answer, the court decreed in favor of the complainants.

The defendant then appealed here.

Art. 12, sect. 15, of the Constitution of Texas of 1868 is as follows: —

"The legislature shall have power, and it shall be their duty, to protect by law from forced sale a certain portion of the property of all heads of families. The homestead of a family not to exceed two hundred acres of land (not included in a city, town, or village), or any city, town, or village lot or lots not to exceed five thousand dollars in value at the time of their destination as a homestead, and without reference to the value of any improvements thereon, shall not be subject to forced sale for debts, except they be for the purchase thereof, for the taxes assessed thereon, or for labor and materials expended thereon; nor shall the owner, if a married man, be at liberty to alienate the same, unless by the consent of the wife, and in such manner as may be prescribed by law."

Mr. Bernard Carter for the appellant.

A mortgage of a homestead, executed by the husband and wife to secure his indebtedness, if it be in the form required by the law of Texas, is valid and binding on them. *Sampson & Keene* v. *Williamson*, 6 Tex. 118; *Jordan* v. *Peak*, 38 id. 429. The mortgagee under such a mortgage can, after default and condition broken, maintain in the Circuit Court of the United States an action for the possession of the land.

It is an elementary principle that a mortgagee who is not, as in this case, a citizen of the State where the suit is brought may, after default and breach of the conditions of the mortgage, maintain in the Circuit Court of the United States ejectment,

writ of entry, or whatever may be the appropriate action in the particular jurisdiction to recover possession of the demanded premises. *Brobst* v. *Brock*, 10 Wall. 529; *Hutchins* v. *King*, 1 id. 58; *Hughes* v. *Edwards*, 9 Wheat. 494. The Constitution of Texas, which exempts from a "forced sale" the homestead, does not inhibit such an action therefor by the mortgagee on the common-law side of the Circuit Court of the United States, although his only remedy in the courts of that State is by a proceeding to foreclose his mortgage.

The action sought to be enjoined seeks no sale of the property, forced or otherwise. It is simply one of the long-established alternative remedies of the mortgagee; viz., that of taking the property into possession, and applying the rents and profits to the liquidation of the debt. 2 Story, Eq., sect. 1016; *Hanway* v. *Thompson*, 14 Tex. 142.

The decisions in Texas establish, —

1. That if there is a mortgage of the homestead, with no power of sale inserted therein, then the court will not decree a sale, because it is in that State a forced sale.

2. That if there is a power of sale inserted in the mortgage or deed of trust, authorizing the trustee or mortgagee to sell on default, he may sell, and this is not a "forced sale." *Sampson & Keene* v. *Williamson*, *supra*; *Jordan* v. *Peak*, *supra*.

The provision in the Constitution adopted by Texas in 1875, that "No mortgage, trust-deed, or other lien on the homestead shall ever be valid, except for the purchase-money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage or trust-deed or other lien shall have been created by the husband alone, or together with his wife; and all pretended sales of the homestead, involving any condition of defeasance, shall be void," can have no application to the rights secured to the appellant by the mortgage of May 2, 1873.

A subsequent statute substantially altering the security cannot affect the rights of the mortgagee. *Bronson* v. *Kinzie*, 1 How. 318.

It makes no difference whether this attempted impairment of them be by a constitutional or a statutory provision. *Rail-*

road Company v. *McClure*, 10 Wall. 511; *Gunn* v. *Barry*, 15 id. 610.

A brief prepared by the late *Mr. Bailie Peyton* was filed for the appellees.

MR. JUSTICE FIELD delivered the opinion of the court.

The premises described in the complaint are in the city of Waco, in the State of Texas. They have been the homestead of the complainants from the time of their purchase, in May, 1870. The conveyance to Robertson in 1873 was accompanied by a defeasance from him, stating that the deed was executed as security for certain promissory notes of the husband. The two documents — the deed, which was absolute in form, and the defeasance — are, therefore, to be taken together as if forming one instrument. They together constitute a mortgage, and as such would be treated in the courts of Texas.

By the Constitution of that State of 1868, which was in force when the notes were given and the mortgage executed, the homestead of a family was not subject to forced sale for debts, except for the purchase-money, or for taxes, and for labor and materials expended thereon. The premises in question, therefore, could not be sold under any decree in a suit for the foreclosure of the mortgage. The prohibition of the Constitution extended to any species of compulsory disposition of the homestead, whether denominated a sale or otherwise. A similar prohibition in the Constitution of 1845 was so construed by the Supreme Court of the State in *Sampson & Keene* v. *Williamson*, contained in the 6th of Texas Reports. In that case Chief Justice Hemphill said that "the Constitution obviously intended that the homestead should be exempted from the operation of any species of execution, or from any forced disposition of the property, whether partial or total, which would disturb the family in the quiet and uninterrupted possession of their home with the property thereto attached. The beneficence of the provision has a much wider range than to protect the family from a sale which would utterly extinguish all right in the property. It shields them also from any extents or deliveries of the property, or from any forcible appropriation of its rents, issues, and profits. It protects the domestic

sanctuary from every species of intrusion which, under color of law, would subject the property, by any disposition whatever, to the payment of debts."

The appellant is the owner of the mortgage in this case, and aware — so states his counsel — that he could not enforce it against the homestead in the State courts, as there mortgages can only be enforced by a decree of sale, commenced an action of ejectment for the premises in the Circuit Court of the United States, contending that the mortgage passed the legal title as against the mortgagors, and that, as its owner, he had a right to recover the possession of the premises for default in the payment of the notes secured. He sought, in other words, to get around the State Constitution by the form of his procedure in the Federal court. We do not think that its wise and beneficent purpose of securing a home to the family against the vicissitudes of fortune can be thus easily evaded. A forced dispossession in ejectment is as much within the prohibition as a forced sale under judicial process. We think, therefore, that the decree in the suit, enjoining the action of ejectment, was properly rendered upon the undisputed facts stated in the complaint; and it is accordingly

Affirmed.

CLARK *v.* UNITED STATES.

A party who bribes an officer of the United States with money cannot maintain an action to recover it.

APPEAL from the Court of Claims.

This is a suit by James S. Clark and Edward Fulton, partners under the name and style of J. S. Clark & Co., to recover from the United States the sum of $10,000 alleged to have been extorted from the petitioners in December, 1864, by Col. Harai Robinson, then acting provost-marshal-general for the Department of the Gulf.

The court below found the following facts:—

I. On the 26th of October, 1864, the Secretary of the Treasury signed and delivered to the claimants the paper of that date, annexed to the petition; and on the same day Abraham Lincoln, President of the United States, signed the order of that date, accompanying said paper, and also annexed to the petition.

II. On the 16th of November, 1864, the claimants delivered to George S. Denison, the acting collector of customs at New Orleans, a bond, duly executed, with proper and sufficient sureties, in the sum of $250,000, as required by the aforesaid paper signed by the Secretary of the Treasury.

III. On the 13th of December, 1864, on the United States ship "Choctaw," off Bayou Sara, La., John J. Cornwell, lieutenant-commander of the United States navy, commanding the second and third districts of the Mississippi River, issued the following order, addressed to naval officers between Bayou Sara and New Orleans: "Pass the steamer 'Sciota,' Captain Owesney, with a cargo of three hundred and thirty-six (336) bales of cotton, to New Orleans, without molestation. The cotton was taken on board at Bayou Sara by my consent."

IV. On the arrival of the steamer "Sciota" at New Orleans, she and her cargo were seized by the United States military police, under the control of Col. Harai Robinson, then acting as provost-marshal-general of the Department of the Gulf, of which department Gen. S. A. Hurlbut was then in command.

V. After the seizure of the "Sciota" and her cargo, General Hurlbut issued a special order, stating that, by direction of the major-general commanding the military division west of the Mississippi, the cotton brought by the steamer "Sciota" should be disposed of as follows: A certain number of bales (number not shown) to be given to the claimants; the remainder to be turned over to O. N. Cutler, the United States purchasing-agent; and that the claimants, should give bonds for their appearance when required. On said Robinson's receipt of said order he sent for the claimants, and they appeared before him, and gave bonds; at which time they did not exhibit to him any papers in relation to the shipment of cotton. It was not the province of said Robinson to have anything to do with the receiving or disposing of the cotton.

VI. On or about the 21st of December, 1864, in the evening, after office hours, the claimants called on the said Robinson at his dwelling, and showed him the papers aforesaid, dated Oct. 26, 1864, signed by the Secretary of the Treasury and the President, which the said Robinson had not before seen or had any knowledge of, and the claimants asked him what he thought of that permit. He told them he thought it was a sweeping one; that it covered all ground. They answered that, notwithstanding that permit, the cotton aboard the "Sciota" had been seized and detained, and themselves put under bond. He asked how that could be. They answered that the permit was of no account unless signed by the major-general commanding the department. He asked them if they had presented it to the general commanding. They said yes, and it had been refused. He then advised them to go to General Canby, who commanded the military division west of the Mississippi, and show the permit to him. They replied, "You know that is useless by the very order which put us under bond: it states by order of the general commanding the military division west of the Mississippi." They further said they were satisfied that it could not be done except by money; that money was wanted; and that they were willing to pay most liberally to have it signed; that that would cover and release their cotton. They said they would pay $10,000 to have that presidential permit indorsed, and their cotton released. He then told them to leave the permit with him, and he would see about it.

The next day the said Robinson took the permit to General Hurlbut, and told him the parties wished to have it signed by him. General Hurlbut replied, "Yes, I have seen this permit before. I have refused to sign it." Robinson then said, "General, these men have offered a large amount of money to get this permit indorsed; there's money in it." Hurlbut perused the permit carefully, and said, "You must take that to Mr. Denison, and have him certify that the proper bonds have been filed by these parties, Clark and Fulton." Robinson took the permit to said Denison, and advised him of the wishes of General Hurlbut. Denison then indorsed on the permit the following certificate: —

"CUSTOM-HOUSE, COLLECTOR'S OFFICE,
"NEW ORLEANS, LA., Nov. 16, 1864.

"I certify that J. S. Clark and E. Fulton have delivered to me a bond, duly executed, with proper and sufficient sureties, in the sum of $250,000, as required by the foregoing authority from the Secretary of the Treasury.

[SEAL.] "GEO. S. DENISON,
"*Sp. Ag't of Treasury Dep't & Act'g Collector of Customs.*"

Robinson then took the permit back to Hurlbut, who placed on it the following indorsement: —

"HEADQ'RS DEP'T GULF, Dec. 23, 1864.

"The above executive order will be obeyed and respected by all military officers within this department.

"S. A. HURLBUT, *M. G. C.*"

That day, or the next, the claimants handed Robinson, at his dwelling, $5,000; and subsequently, on the same day, he handed that money back to them, stating to them that it did not suit him to receive it in that manner. They asked him how he would receive it. He told them he would receive it through Denison, the collector of the port. The next morning Denison handed him an envelope with $5,000 in it, out of which Robinson took $2,000 or $3,000 and gave it to General Hurlbut, and laid away the balance in the provost-marshal-general's office.

After that money was given to Robinson, the claimant Clark saw him again, and said to him, "Now I have the permit indorsed, see if you can get my cotton released; see if General Hurlbut will give an order releasing or justifying the release of my cotton." Robinson then saw Hurlbut and stated the facts to him, and Hurlbut then wrote the following paper: —

"HEADQUARTERS DEPARTMENT OF THE GULF,
"NEW ORLEANS, Dec. 24, 1864.

"Pursuant to executive order of his exc'y the President of the United States, J. S. Clark and E. Fulton are permitted to bring the number of bales of cotton in said order mentioned from Ratcliff's Landing, on the Miss. River, 25 miles above Bayou Sara, on the steamer 'Sciota,' provided the same is received under protection of a gunboat. The taking of any passengers or freight to be landed at

any point, or the payment of anything but United States treasury notes, will work forfeiture of steamer and cargo. The cotton returning on the boat will be reported and identified by Mr. O. N. Cutler and the prov. mar. gen'l.

"S. A. HURLBUT, *M. G. C.*"

The claimants then paid Robinson another $5,000, which was disposed of in the same manner as the first.

Afterward, and prior to the thirteenth day of February, 1865, they paid Robinson the further sum of $3,000, of which he gave $1,000 to General Hurlbut, and the rest was disposed of by Robinson in the provost-marshal-general's office.

Besides the moneys so received by Robinson from the claimants, other moneys were paid him by C. A. Weed & Co., the amount of which does not appear, and also the sum of $1,000 was paid him by one Courtney.

Of the whole amount paid him by all those parties, $8,000 went into the hands of General Hurlbut, who returned the same amount to Robinson on or about the 4th of April, 1865. With the remainder of said whole amount, or a part of it, Robinson purchased gold coin, which he deposited in the First National Bank of New Orleans, taking therefor certificates of deposit in favor of different officers of the bank, which they indorsed over to him, to the amount of $7,602.25.

VII. In January, 1865, a special commission in New Orleans was appointed by the Secretary of War, with the sanction of the President, and was in session there until May 5 following.

On the 13th of February, 1865, that commission placed the said Robinson in solitary confinement, and the same day stopped the payment of said certificates of deposit; and the amount of them, in gold coin, was afterward turned over by the commission to the Secretary of War, by whom the same was put as a special deposit in the Treasury Department until the 16th of June, 1869, when, at the request of the Secretary of War, the same was covered into the treasury.

That commission also took $8,000 from said Robinson, which was likewise turned over to the Secretary of War, by whom it was, with the addition of $40 interest, accrued on compound interest notes, paid into the treasury on the 10th of June, 1869.

VIII. The money paid as aforesaid by the claimants to said Robinson was paid by them with the corrupt motive and purpose on their part of procuring official action whereby their cotton should be released.

The following additional finding was allowed at the request of the claimants.

It does not appear that there were any interviews between the claimants and the said Robinson upon any subject, nor any offer of the payment of any sum or sums of money by them to the said Robinson, for any purpose, until after the seizure, by the United States military police, of the claimant's steamer "Sciota" and the cargo of cotton thereon, which had been shipped from Bayou Sara, La., under the pass and supervision of Lieut.-Com. John J. Cornwell, of the United States steamship "Choctaw," on the thirteenth day of December, 1864.

Upon the foregoing facts the conclusion of law was that the claimants were not entitled to recover.

The petition having been dismissed, the claimants appealed here.

The paper referred to in the first finding is as follows: –

"TREASURY DEPARTMENT, Oct. 26, 1864.

"J. S. Clark and E. Fulton allege that prior to the second day of July, 1864, under authority of Geo. S. Denison, special agent of the Treasury Department at New Orleans, they purchased in the parishes of East and West Feliciana, in the State of Louisiana, 3,435 bales of cotton upon which they advanced the sum of $123,200 in United States currency, as part payment for the same, and became liable to pay the balance of the purchase-money.

"That after purchasing and becoming owners of said cotton, and while in the act of moving the same to market for sale, they ascertained that by the passage of the act of July 2, 1864, they were prevented from proceeding with the shipment of said cotton or in any way interfering with the same, and it now remains at the points above named, exposed to the depredations of guerillas. They therefore ask that authority may be granted them to complete the transaction commenced and conducted thus far under the prescribed rules and regulations of the Treasury Department.

"After full examination, and in view of the fact that the loyalty of the parties is not questioned, and that there are no adverse claimants to said cotton known to the department, authority is hereby

given to the said J. S. Clark and E. Fulton to transport by way of New Orleans (where all government fees and dues shall be paid before shipment therefrom) the cotton in question, provided they shall first present to the acting collector of customs, at New Orleans, the original authorities or permits under which they acted, or copies thereof certified by the officer with whom they are filed, with proof to his satisfaction that the cotton was actually purchased in good faith, under and by virtue of said authorities, and payment made and liabilities incurred as alleged; and provided further, that the said J. S. Clark and E. Fulton shall first execute to the satisfaction of the said acting collector at New Orleans a bond with sufficient security in the penalty of $250,000, conditioned that all fees and taxes, in any way due or accruing to the government of the United States from said cotton, shall be paid on its arrival at New Orleans, and any cotton transported or attempted to be transported under this authority without the original permits or authorities, or certified copies thereof and proof herein required, shall be seized and proceeded against for forfeiture and condemnation to the United States.

"The acting collector at New Orleans shall record and file, in his office, a copy of this authority, and deliver the original to the said J. S. Clark and E. Fulton, after indorsing upon it his certificate, attested by his official seal, that the required bond has been duly executed and delivered.

"The conditions herein stipulated having been complied with, the cotton moving under this authority, or under permits given in pursuance hereof, will be allowed to be transported without hindrance or delay.

"The leave hereby granted is confined to so much of said cotton as had been actually paid for, or said parties had become legally liable to pay for, under and by virtue of permits properly issued by authority of this department, prior to said second day of July, 1864, and the power to revoke the authority hereby granted at any time, should satisfactory cause appear, is reserved to this department.

"W. P. FESSENDEN,
"*Secretary of the Treasury.*"

"EXECUTIVE MANSION, Oct. 26, 1864.

"The Secretary of the Treasury having by the terms of and upon the conditions contained in the foregoing paper by him signed, directed that J. S. Clark and E. Fulton be allowed to transport from certain localities in the State of Louisiana, to markets in

the loyal States or elsewhere, 3,435 bales of cotton owned by them in said State, and that permits be given them for that purpose by the acting collector of customs at New Orleans:

"It is ordered that all cotton moving in compliance with such direction of the Secretary of the Treasury, or permits granted in pursuance thereof, shall be free from seizure or detention by any officer of the government, and commandants of military departments, districts, posts, and detachments, naval stations, gunboats, flotillas, and fleets will observe this order, and give the said J. S. Clark and E. Fulton, their agents and transports, proper facilities and passes for the purpose of getting said cotton through the lines, and safe conduct within our lines while the same is moving in strict compliance with the directions of the Secretary of the Treasury and permits above referred to.

"ABRAHAM LINCOLN."

Mr. Samuel Shellabarger and *Mr. John J. Weed* for the appellants.

The appellants might have recovered of the provost-marshal-general at New Orleans the money which he received from them to secure the release of their cotton and the indorsement of the permit and executive order. His wrongful and fraudulent extortion of the money which was ultimately taken from him and deposited in the treasury did not divest them of their title to it, nor bar their right to recover it of the United States.

An action may be maintained whenever the defendant, who has received money belonging to the plaintiff, is obliged by the ties of natural justice and equity to refund it. *Carey* v. *Curtis*, 3 How. 236; *Nash* v. *Towne*, 5 Wall. 689; *Moses* v. *Macferlan*, 2 Burr. 1005; *Clark* v. *Shee*, Cowp. 197; *Butler* v. *Harrison*, id. 565; *Chilton* v. *Braiden's Administratrix*, 2 Black, 458; *Castle et al.* v. *Bullard*, 23 How. 172; *Olmstead* v. *Hotaling*, 1 Hill (N. Y.), 318; *Bank of Boston* v. *United States*, 10 Ct. of Cl. 519.

The appellants paid the money to the provost-marshal-general to procure the release of their property which he had illegally seized, and to obtain the possession of it which he unlawfully detained from them. It is well settled that a party paying money for such a purpose may recover it in an action

for money had and received. *Atlee* v. *Backhouse*, 6 Mee. & W. 633, 650; *Chase* v. *Dwinall*, 7 Me. 134; *Oates* v. *Hudson*, 6 Exch. 346; *Shaw* v. *Woodcock*, 7 Barn. & Cress. 73; *Joyner* v. *Egremont*, 3 Cush. (Mass.) 567; *Preston* v. *Boston*, 12 Pick. (Mass.) 7; *Boston & Sandwich Glass Co.* v. *Boston*, 4 Mich. 181; *Riply* v. *Gelston*, 9 Johns. (N. Y.) 201; *Clinton* v. *Strong*, 9 id. 370; *Baltimore* v. *Heffernan*, 4 Gill (Md.), 425; *Forbes* v. *Appleton*, 5 Cush. (Mass.) 118; *Storer* v. *Mitchell*, 45 Ill. 213; 1 Parsons, Contracts, 395, 5th ed.

The right of the appellants to recover in this action cannot be defeated, upon the maxim, *In pari delicto potior est conditio defendentis.*

The evidence does not establish such a state of facts as renders this principle applicable. The appellants' cotton had been seized previously to the payment of the money, and the executive order of the President of the United States, exempting it from seizure by the military authorities, was ignored and treated with contempt. The acts of the provost-marshal-general were illegal and oppressive, and the appellants were obliged to pay the money extorted by that officer or submit to those acts. It was not a case of *par delictum.* It was oppression on one side and submission on the other. It can never be predicated as *par delictum*, when one holds the rod and the other bows to it. *Smith* v. *Cuff*, 6 Man. & Sel. 160; *Alsoqer* v. *Spalding*, 4 Bing. N. C. 407; *Horton* v. *Riley*, 11 Mee. & W. 492; *Browning* v. *Morris*, Cowp. 790.

The Solicitor-General, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Upon the facts found the court below was right in treating this as a case of bribery rather than extortion. The claimants undoubtedly held an executive license to transport by way of New Orleans, notwithstanding the act of July 2, 1864 (13 Stat. 377, sect. 9), any cotton they had bought in the parishes of East Feliciana and West Feliciana, under the authority of the special agent of the treasury at New Orleans, if they gave the required bond and presented to the acting collector of customs at that port the original authorities or permits under which

they acted, or copies thereof certified by the officer with whom they were filed, with proof to the satisfaction of the acting collector that the cotton was actually purchased in good faith under and by virtue of such authorities. By the express terms of this license any cotton transported, or attempted to be transported, under it, without the original permits or authorities or certified copies and proof required, was subject to seizure and condemnation. It is not pretended that when the seizure was made the claimants had in their possession any evidence of their right, under this authorization, to transport the cotton which was seized. While it has been found that the bond was executed and delivered to the acting collector on the 16th of November, 1864, the findings are entirely silent as to the presentation of the original permits or the required proof before the transportation was entered upon. Neither did the executive license have upon it the prescribed certificate that the bond had been executed and delivered. Under such circumstances the seizure could not have been wrongful in the first instance. It was the duty of the military authorities at that point to see that nothing passed out from the enemy's country under this authority until the requisite evidence was furnished. New Orleans was a military post, and Congress had seen fit to restrict materially the power of the President to permit commercial intercourse with the inhabitants of the insurgent territory. The executive license, when construed in connection with this new congressional action, was evidently intended only to protect such rights as had become vested under previous authorities or permits rightfully issued. Therefore, nothing could pass except what the collector had been satisfied by proof was "actually purchased in good faith under and by virtue of said authorities."

The claimants, when the seizure was made, did not attempt to secure a release by producing the necessary evidence of their rights, but by tempting a subordinate officer in the military service by a liberal offer of money. He made no demands, but accepted what they voluntarily gave him. In this way the executive order was evaded and a pass through the lines secured by corrupting an officer. Clearly this was bribery, and placed the claimants and the man they corrupted *in pari*

delicto. They could not recover back from him the money they paid, neither can they from the United States after it has been taken from him as a punishment for his faithlessness to his trust.

It is insisted, however, that when the claimants presented to the military authorities the executive license, with the certificate of the acting collector indorsed to the effect that the requisite bond had been delivered to him, they had done all that was required to get their property back and proceed with the transportation. They evidently did not so understand the effect of what they had done, for they voluntarily offered and paid more money to secure what they wanted, and that they interpreted the instrument correctly is, to our minds, clear. The execution of the bond is one thing, and the production of the original permits and proof another. It is true that in the license the provision as to the bond follows that as to the permits and proof; but the delivery and acceptance of the bond were no more evidence of the presentation of the permits than the presentation of the permits would have been of the delivery of the bond. The certificate of the bond on the license was evidence of the performance of that condition, but nothing more. The execution of the bond was not at all dependent on the presentation of the permits and proof. The penalty of the bond was fixed in Washington and specified in the license itself, and it was entirely immaterial, so far as the requirements of the license were concerned, whether the bond was delivered before or after anything else was done. Before, therefore, the commanding general could be required to release the seizure, it must have been shown to him that the acting collector was satisfied that the original permits had been given, and the purchases in good faith made, as alleged by the claimants. Instead of attempting to make such a showing, bribery was resorted to, and in that way the necessary order obtained.

Beyond all doubt, the judgment below was right, and it is consequently

Affirmed.

HUNNICUTT v. PEYTON.

1. Exceptions reserved at the trial of the cause may, within such time thereafter during the term as the judge shall deem reasonable, be reduced to form and presented to him for signature, and they are not waived by suing out a writ of error before his signature is obtained.
2. Where, under such circumstances, bills of exceptions are signed during the term, it is not necessary to render them effective that they be antedated, or ordered to be filed *nunc pro tunc*, as of a time during the trial.
3. A party who, under article 24 of the Mexican law of 1825, procured from the government, by purchase, a grant of public lands, could alienate it before they were selected; and his formal act of sale, with a power to his alienee to obtain the title of possession, constituted the latter the absolute owner of them, when he, by the proper officer, was furnished with the evidence of title and put in possession. Where, therefore, the grant contained no specific description of the lands, but contemplated the selection and location of them, the title of extension, when given to the alienee, is complete.
4. In questions of private boundary, the declaration of a deceased person of particular facts, as distinguished from reputation, is not admissible unless it be shown that he had knowledge of that whereof he spoke, and was then on the land, or in possession of it, and was pointing out and marking the boundary, or discharging some duty in relation thereto. A declaration, merely reciting something past, is within the rule which excludes hearsay evidence.
5. The decisions of the Supreme Court of Texas examined and *held* to be in harmony with this ruling.
6. The possession of a person who, under color of title, enters upon vacant lands, and holds adversely, is construed to include so much as is within the boundaries of his title, and to that extent the true owner will be deemed to be disseised. But if the latter be in actual possession of any part of the lands whereon the entry is made, his constructive seisin extends to all not in fact occupied by the intruder.

ERROR to the Circuit Court of the United States for the Western District of Texas.

This was an action brought by Bailie Peyton and others against Hunnicutt and others to recover possession of a tract of land in the county of Falls, Texas, being "four leagues of land on the east of left bank of the Brazos River, known as the Gregorio Basquez survey of four leagues," and more particularly described in the amended petition as beginning at a stake marked "P" on the east bank of the river Brazos, in the county of Falls, State of Texas, at the point where the upper line of the Austin & Williams reserve, on the east side of said river, intersects said river; running thence with said upper

line of the reserve N. 71° E. 20,220 varas to a stake, and crossing Isaac's Creek; thence S. 19° E. 5,000 varas to another stake for the third corner; thence S. 71° W. 18,320 varas, covering again the aforesaid creek to a stake on the Brazos River for the fourth corner; thence up said river to the place of beginning, covering an area of four leagues, fronting on said river and lying within said Austin & Williams reserve, immediately below and adjoining said upper line of said reserve.

The defendants pleaded the general issue and the Statute of Limitations. Sundry exceptions were taken during the trial. The jury returned a verdict for the plaintiffs, on which judgment was rendered. The defendants sued out this writ.

They assign for error that the court erred, —

I. In admitting the documentary evidence set out in their bill of exceptions, being certified copies of certain papers, and in holding that they vested a legal title in Jonathan C. Peyton. The copies are as follows, the plaintiffs offering in evidence the original *testimonio* of their title: —

"*First*, A power of attorney, with power of substitution, from Gregorio Basquez to Jayme Hartz, dated the twentieth day of September, eighteen hundred and thirty-one (1831).

"*Power of Attorney, with Power of Substitution, from Gregorio Basquez to Jayme Hartz.*

"Second stamp — twelve reales.

"Legalized for the State of Coahuila and Texas for the years 1828, '29, '30, & '31.

"By commission:

"JESUS DE LOS SANTOS COY.

"In the town of Nacogdoches, on the twentieth day of September, 1831, before me, the citizen Manuel de los Santos Coy, sole constitutional alcalde of the aforesaid town, and instrumental witnesses hereinafter named, besides those of my assistants with whom I act agreeably to the law, appears the citizen Gregorio Basquez, of this jurisdiction, in his proper person, whom I declare to know, and who says: That by these presents he executes, gives, and confers all his power, full, ample, and sufficient, whatever may be required by law and is necessary or may be of value, to Don Jayme Hartz, of this jurisdiction special, that he, in representations and use of the rights and interests which pertain to the grantor,

may solicit of the person or persons authorized to that effect, the possession and titles of eleven leagues of land, which he has obtained from the supreme government of the State by way of purchase, with the authority to empower him to solicit in the place or places which best suits him, together or separate, according to the tenor of the concession of the date of 11th March of this year, which I declare to have seen.

"And the grantor has placed in the hands of his attorney that he may do and perform, in the name of the grantor, all whatsoever he might do were he actually present, since for all as aforesaid, annexed, concerning, incident, and pertaining, he gives and confers the most ample and extensive power, without any limitation whatever, and without which, by default of any clause or requisite, he gives to this power all the force and effect, whatever the same may be, as if the same was herein literally written and inserted.

"That he may appoint substitutes, revoke the same and appoint others anew, with free, frank, and general administration in form, since for all he relinquishes by this act whatever the law permits, and acknowledges all whatsoever his attorney may do or perform by virtue of this power of attorney, binding his person and property in every form, and renounces all laws in his favor.

"In testimony whereof thus he executes, as he does not know how to write, he makes the sign of the cross; there were present, as instrumental witnesses, the citizens Martin Ybarvo, Antonio Menchaca, and Carlos Gil, residents of this town, and those of my assistants in the form prescribed by law, to which I certify.

"MANUEL DE LOS SANTOS COY.

"Sign of the cross of—

"GREGORIO BASQUEZ. +

"Ass. witness: JESUS DE LOS SANTOS COY.

"Ass. witness: VITAL FLORES.

"This *testimonio* agrees with the original which remains in the archive of the public documents of this municipality, which goes truly and legally compared and corrected, and at its transcribing, correction, and comparing the same, there was found the same instrumental witnesses who were present at its execution, besides those of my assistants, with whom I act in the form prescribed by law, to which I certify.

"MANUEL DE LOS SANTOS COY.

"Ass witness: JESUS DE LOS SANTOS COY.

"Ass. witness: VITAL FLORES."

"*Second*, An act of sale by Gregorio Basquez to the said Jayme Hartz of his concession in sale, which had been made to him by Santiago del Valle, on the eleventh day of March, eighteen hundred and thirty-one (1831), bearing date Sept. 22, eighteen hundred and thirty-one (1831).

"*Act of Sale, Basquez to Hartz.*

"Third stamp — two reales. [STAMP.] For the years 1830 and 1831.

"MOST EXCELLENT SIR, — Gregorio Basquez, a native of the city of Mexico, and now residing in this town, with the due respect to your excellency I would represent, that understanding the provisions of the twenty-fourth article of the colonization law of the State, of 24th March, 1825, and in virtue of being a native Mexican, with due respect to your excellency, I pray you be pleased to grant me in sale eleven leagues of land on the vacant territory of this department, with the privilege of selecting them together or separate, or in distinct places, as may suit me, with the understanding that I offer to settle and cultivate them as customary, that it may be to the purpose within the term which the law prescribes, making the payments of its value on the terms and at the places designated in the twenty-second article, and to sustain the right of the country, and of the State, and all other that may be in conformity with the laws which govern us and under their protection.

"I pray your excellency be pleased to do as aforesaid, in which I will receive favor.

"NACOGDOCHES, Sept. 28, 1830.

"GREGORIO BASQUEZ.

"LEONA VICARIO, March 11, 1831.

"In conformity with the twenty-fourth article of the colonization law of 24th March, 1825, I grant by sale to the petitioner the eleven leagues of land that he solicits on the vacant territory of the State at the place that may best suit him, after the commissioner of the supreme general government shall have set apart a sufficiency of land for the payment of the debt due by the State to the Federation. The commissioner for the partition of land in the enterprise to which pertain the land solicited by the petitioner, and in his default, or that the same not being embraced by any enterprise whatever, the first or sole alcalde of the respective jurisdiction will comply with the orders on the subject and put him in possession of said leagues, and issue the proper title, previously classifying the quality of them; for according to their designation he shall satisfy

the State, for the payment of which I concede him the times designated in the twenty-second article of the aforesaid law.

"Let a copy of his petition and this decree be given by the secretary of state to the interested party, so that upon application with it to the commissioner it may have the desired effect.

"LETONA.

"SANTIAGO DEL VALLE, *Secretary.*

"A copy of the original on file in the archives of the office of the secretary of state, in my charge, from whence it was taken by orders of his excellency the governor.

"LEONA VICARIO, March 14, 1831.

"SANTIAGO DEL VALLE, *Sec'y.*

"Second seal — twelve reales.

"Furnished for the State of Coahuila and Texas, for the terms 1828 and '29.

"By the commissioner,

"JESUS DE LOS SANTOS COY.

"In the town of Nacogdoches, the twenty-second day of the month of September, 1831, before me, citizen named de los Santos Coy, sole constitutional alcalde of the said town, and the instrumental witnesses, whose names appear at the end of this document, assisting me to authenticate the same in the absence of a notary appointed conformably to law, appeared the citizen Gregorio Basquez, of this district, in whom I placed confidence and with whom I am personally acquainted, and said that embracing the right which the twenty-seventh article of the colonization law of the State of the 24th of March, 1825, gives him, he applies for the present order of sale by which he has sold really and publicly in fee and for ever Don Jayme Hartz of this vicinity, as follows: —

"A grant of the supreme government of the State dated 11th of March, of the present year, of eleven leagues of land located on the public domain in this department, which was sold him by virtue of the twenty-fourth article of the colonization law above cited, with the same conditions, privileges, and obligations which were imposed upon the petitioner for whose possession and title he has granted a special power to the same purchaser, dated the 20th of the present month and the term of our Lord already given, for the price and sum of one hundred and fifty dollars, which he acknowledges having received in current coin to his satisfaction, wherefore he renounces the laws of *non numerata pecunia no entrego e prueba*, it

being an express condition that the purchaser shall pay the costs of the surveyor, commissioner, paper, sealing, enrolling of the titles, and the claims of the State for the usual price of the lands conformably to its quality, and for all the legal charges that may be considered as an augmentation of the price mentioned above in the sale by the said commissioner, and declared that this is the just value of the said lands; but if they are worth more he makes a surplus and remainder, a pure, more perfect, and irrevocable gift and donation to the purchaser and surrenders the right called *inter vivos;* and for the security and surety of this sale he pledges the personal property that he now has or may have, and with it he submits himself to the law and jurisdiction of the judges and justices of the State, and particularly to those in this town, to whom he gives the same competency for exercising every right and executive obligation as if their decrees were authoritative judicial decrees. He renounces his proper judicial domicile and vicinity, the law *si cum . . . de jurisdictione omnium judicum* with the ['general'] of the right in respect to form.

"In testimony of which, as the petitioner was not able to write, he made a cross, the citizens Martine Ubarvo, Antonio Menchaca, and Charles Gil, present and living in the said town, instrumental witnesses with myself and those assisting me in the form prescribed according to law, to which I hereby certify.

"MANUEL DE LOS SANTOS COY

"Sign of the cross of—

"GREGORIO BASQUEZ. +

"De asistencia: JESUS DE LOS SANTOS COY.

"De asistencia: VITAL FLORES.

"I have compared this testimonial with its original, which is placed in the archives of the public instruments of this municipality, and which is faithfully and legally corrected and compared, and at the copying, correcting, and comparing of which were present as instrumental witnesses the same as are attached to this grant, besides those assisting me authenticating in the form prescribed by law, to which I certify.

"MANUEL DE LOS SANTOS COY.

"De asistencia: JESUS DE LOS SANTOS COY.

"De asistencia: VITAL FLORES."

"*Third*, A substitution of Jonathan C. Peyton by Jayme Hartz, to be the attorney of Gregorio Basquez, bearing date March 2 (1832), eighteen hundred and thirty-two.

"In the town of San Felipe de Austin, on the second day of March, 1832, before me the citizen Horatio Chriesman, first alcalde of the municipality, and witness Jayme Hartz, a resident of Nacogdoches, exercising the authority conferred on him by the preceding power of attorney, consents to substitute it in all and for all, on Jonathan C. Peyton, of this jurisdiction, to whom he relinquishes and accordingly does relinquish, binding the property bounden in said power of attorney, and agreeing to the substitution in form and signs it, whom I declare to know, there being as witnesses Don Amos Gates and Samuel Gates, residents of this colony.

"HORATIO CHRIESMAN.

"Ass. witness: FRANCIS ADAMS.

"Ass. witness: HYMAN HERTZ.

"OLIVER JONES."

"*Fourth*, An act of sale of the concession of Basquez, by Jayme Hartz to Jonathan C. Peyton, bearing date March 2 (1832), eighteen hundred and thirty-two.

"*Sello segundo — doce reales.*

"Furnished for the State of Coahuila and Texas for the terms 1828 and '29, '30, and '31.

"WILLIAMS.

"In the town of San Felipe de Austin, 2d of March, 1832, before me, the citizen Horatio Chriesman, first alcalde for this municipality, and the instrumental witnesses which were named at the conclusion of this paper, besides those assisting me to give it authenticity in the absence of a notary, appeared the citizen Jayme Hartz, of Nacogdoches, in whom I have confidence and with whom I am personally acquainted, and said he acknowledges the present agreement, and has sold really and publicly, in fee and for ever, to the citizen Jonathan C. Peyton, of this vicinity, a grant of the supreme government of the State, dated 11th of March, the year last passed, of eleven leagues of land located on the public domain of this department, which was sold to the citizen Gregorio Basquez, of the municipality of Nacogdoches, by virtue of the twenty-fourth article of the colonization law of the 24th of March, 1825, which, by a public instrument of sale dated 22d September, 1831, and one which is authentic, having seen it myself, he transferred, confirmed, and sold the said grant of eleven leagues of land to your petitioner, by which possession and title he granted him especial power under

date of the same month and year, and in which I have confidence, having seen it also, and which is hereby transferred to the purchaser, and which documents your petitioner will place in his hands, and he hereby concedes to him the said grant of eleven leagues of land upon the same conditions, privileges, and obligations that were imposed upon the said Gregorio Basquez by the governor, for the price and sum of five hundred dollars, which he acknowledges to have received in the current coin to his full satisfaction; upon which he renounces the laws *non numerata pecunia no entrego e prueba*, it being upon the express condition that the purchaser will pay the charges of the surveyor, commissioner, paper-sealing, recording of title, and claims of the State for the original price of the land conformably to its quantity, and for all other legal charges which may be considered as an augmentation of the said price for which he has sold the said grant; and he declares that this is the just value of the said lands, but if they are worth more or less the excess or surplus he makes a gift or donation to the purchaser pure, more perfect, and irrevocably; and for the sanctity and security of this sale he binds his person and property that he has or may have, and with them submits himself to the jurisdiction and judgment of the tribunal which in this matter ought to adjudicate, and he gives them the same competency for exercising every right and executive obligation as if they were decrees authoritatively passed and properly adjudicated.

"He renounces all the laws which could favor him and prevent his general renunciation. In testimony of which I grant this and name with myself the instrumental witnesses, D'n Amos Gates and Samuel Gates, citizens of this municipality, to which I certify as well as those assisting me.

"HORATIO CHRIESMAN.
"HYMAN HARTZ.

"De Asistencia: OLIVER JONES.
"De Asistencia: FRANCIS ADAMS.

"TREASURY DEPARTMENT, OFFICE OF COMM'R OF REVENUE.
Sept. 19, 1840.

"Received of H. W. Raglin the sum of twelve hundred dollars in the promissory notes of the government, being the amount of dues upon the within fifty labors of arable land and ten hundred and twenty-five labors of pasture-land granted to Gregorio Basquez, title dated Oct. 7, 1833, as appears from the certificate of John

P. Borden, commissioner of the general land-office, now on file in the office; payment made by the administratrix of J. C. Peyton, att'y.

"$1,200.

"E. L. STICKNEY, *Acting Comm'r of Rev.*

"I, Harrison Owen, county clerk of records in and for the county of Robertson, do certify that a true copy of the within is entered on record in my office at Franklin this third day of April, A.D. 1841.

"HARRISON OWEN, *Co. Rec. R. C.*

"Recorded in book C, pages from 110 to 125. Paid by B. Gillespie, my fees, par funds."

"*Fifth*, Grant or title from Luke Lesassier, alcalde, &c., of eleven leagues of land (including the four in controversy) to Jonathan C. Peyton, attorney of Gregorio Basquez, of date eighteen hundred and thirty-three (1833).

"Third stamp — two reales.

"Legalized for the State of Coahuila and Texas for the years 1828, '29, '30, '31, '32, & '33. Williams.

"In the town of San Felipe de Austin, on the seventh day of October, 1833, I, the citizen Luke Lesassier, constitutional alcalde of this town and its jurisdiction, in the exercise of the authority which has been conferred on me by the supreme government of this State, by decree dated at Leona Vicario, on the 11th March, 1831; and in consideration of the sale executed by the aforesaid supreme government in favor of Gregorio Basquez, a native of the city of Mexico, then residing in the town of Nacogdoches, of eleven leagues of land, as will appear from the superior decree of sale, dated in the aforesaid Leona Vicario on the eleventh day of March, 1831, and presented by his attorney, Jonathan C. Peyton, as will be seen on pages 3 and following of this proceeding; and in attention to the superior order of his excellency the lieutenant-governor, dated on the twenty-ninth day of January of this year, and circulated by the chief of this department on the 19th of last February, repealing the provisional decree of the supreme government of the State in relation to those citizens to whom had been granted land not being permitted to take possession of them until the commissioner-general of the nation shall have made a reservation; and inasmuch as none of those eleven leagues applied for by the interested party are at

any of those points ceded to the federation by the aforesaid order and in view of the approval granted by the empresarios Messrs. Austin and Williams, written upon the first page of this proceeding, as the lands belong to the enterprise of said empresarios — in conformity with the colonization law of the State of 24th March, 1825, and in the name of the State, I confer upon and put the aforesaid attorney of the citizen Gregorio Basquez in real, virtual, personal, and actual possession of eleven leagues of land, the same which he has asked for and that the government has sold to him upon the Brazos River; the situation, lines, limits, and corners of the same are delineated in the notes of survey made by the principal scientific surveyor, Francis W. Johnson, on pages two, and following of this proceeding, with the figure thereof shown in the map hereunto annexed. The aforesaid lands, by said notes of survey, are, in the opinion of the surveyor, to be of the arable class in two leagues, and of the pasture class in nine leagues.

"I, the commissioner and alcalde aforesaid, in the exercise of the authority conferred on me by the law, do declare, in accordance with said classification, he shall satisfy the State in the sum of one thousand two hundred dollars, according to the provision in the twenty-fourth article of the aforesaid colonization law, dated on the 24th March, 1825, and in the terms designated in the twenty-second article of the same law, under the penalties therein established; being notified that within one year he shall construct permanent landmark at each angle of the land; that he shall cultivate the same in conformity with the provisions in the aforesaid law, and scrupulously comply with all ordained in it, and other enactments on the subject.

"Therefore, by virtue of the authority vested in me by the aforesaid decree of the supreme government of the State, and other orders from the same government on the subject, by the law and pursuant instructions which guide me, I issue the present title, and order that an authenticated copy be taken of it, and let it be delivered to the interested party, that he may possess, use, and enjoy the lands which have been sold to him, his children, heirs, and successors, or whoever of him or of them may have cause, interest, or right to represent, for such is the will of the State. Given at the town of San Felipe de Austin, on the day and date above written, which I sign, with assisting witnesses, according to law.

"L. LESASSIER.

"Ass. witness: W. T. LIGHTFOOT.

"Ass. witness: C. C. GIVENS."

II. In admitting as evidence the papers set forth in the foregoing assignment of error, inasmuch as they do not identify and describe any definite parcel of land.

III. In admitting the testimony of Horatio Chriesman to prove by the declarations of Moore, who is now deceased, that the Basquez grant was surveyed by the latter on the reserve line or at any other particular place, such evidence being merely hearsay.

IV. In admitting his testimony, wherein he undertakes to tell what Moore told him about the location of the Austin & Williams reserve line and the Basquez grant, particularly that Moore informed him in 1834 that he had made the survey of the said four-league Basquez grant; that the upper line of said grant began on the east side of the Brazos River, at the point where the upper line of the reserve began; and that the upper line ran north 71 degrees east, with the reserve line, the full distance of the Basquez line; and that the upper line of the Basquez and the upper line of the reserve were the same to the extent of the Basquez line, — because there was no proof that the upper line of Austin & Williams's reserve was ever in fact run, or was ever required by law, order, or decree to be run, and because there is no call in said Basquez's grant for said line; and because said witness did not state that Moore ever pointed out the place on the ground where he had run either the Basquez line or the said reserve line; and because the testimony was hearsay.

V. In admitting in evidence the following documents: —

"THE STATE OF TEXAS,
"*County of Falls:*

"*To the Honorable the District Court in and for the County of Falls:*

"In pursuance of an order made at the last or fall term of said court (A.D. 1869), directing the undersigned surveyors to proceed and run, or make any survey necessary, and show by report to what extent, if any, the land claimed by J. C. Pool, plaintiff, and C. Jones, defendant, conflicts, and also the land claimed by Rhoda B. Huckins *et als.*, plaintiffs, conflict, if any, with the land claimed by and in possession of J. C. Pool, defendant; said land situated in Falls County, on the east margin of the Brazos River.

"In accordance with said order we, the undersigned surveyors, met on the eleventh day of November, A.D. 1869, at what is known as the Falls of the Brazos, on the east margin of said stream, and all the parties having been notified, and being present, either by themselves or attorneys, we ascertained by the calls of the A. De la Serda grant and the field-notes of the José M. Sanches survey, together with a full and complete examination of lines and natural marks, the precise locality of the southern line of the said La Serda grant, it being the northern line of the said Sanches survey, and for a more particular description reference is hereby made to our accompanying plat, which is made a part of this report.

"We then proceeded to ascertain the boundaries of the Gregorio Basquez grant, and finding that the surveyor of Austin & Williams's colony located the same on what is known as Austin & Williams's reserve line; after searching we found marks, corresponding in age and course, in post-oak timber, near the north end of what is known as Hog Island. After tracing said marks about fifteen miles, and finding the line to run N. 71 E., running from the Brazos River, and judging from the age of the marks and course of the line, together with the facts that after it passed the said Basquez N. E. corner it ran across, and without respect to all the known surveys of the section it passed, and there being no corners made on it, we were entirely satisfied that we were on said reserve line.

"We then ran the northern boundary of the Basquez to the east bank of the Brazos River, and found the following results:—

"That all the land claimed by said J. C. Pool is included within the boundaries of the said Basquez and the said Sanches survey, as set forth in our accompanying plat of said survey, this the 16th of November, 1869.

"S. W. BINGHAM.
R. F. ALEXANDER.
W. S. HUNNICUTT.
J. H. COLLARD.

"THE STATE OF TEXAS,
"*County of Falls:*

"Personally appeared before the undersigned authority Sam. W. Bingham, R. F. Alexander, W. S. Hunnicutt, and J. H. Collard, whose names are signed to the foregoing report, who, after being duly sworn by me, on oath declare that said report is true and correct in the facts therein stated, and the conclusion arrived at

is true and correct, according to their opinion as scientific surveyors.

"To certify which I hereto sign my name and affix my seal of office on this sixteenth day of November, 1869.

"SAMUEL M. DALTON, *D. C. F. C.*"

"*To the Clerk of the United States District Court for the Western District of Texas, at Austin:*

"ANGELINA B. EBERLY *et als.*
vs.
JAMES MARLIN *et als.*

"SIR,—In obedience to the commands of an order of survey issued from under your hand and seal, in your official capacity of the clerk of the District Court of the United States for the Western District of Texas, at Austin, commanding me to survey a certain tract of land containing four leagues, situated in this county, on the eastern margin of the Brazos River, below the Great Falls thereof, and to ascertain the lines thereof, which land is claimed by the plaintiffs to the above-entitled cause, and which order of survey issued in said cause, and which land was titled to one Gregorio Basquez, I proceeded in last summer (the date not now being remembered) to search for said lines, and about one mile and a half below the Great Falls of the Brazos, where on its eastern margin I found a line to start out from the river at a course of N. 68° E., in a weed-prairie, and at 9,170 varas from the river crossed Big Creek, at 20,220 varas from the river corners in prairie, strike prairie at about 12,500 varas. I then ran south 21° E., at right angles with said line at 4,870. I found another old line running S. 60° W. to the river at 17,266 varas, making a difference in the length of the two lines of 2,960 varas.

"I found the league and labor of land surveyed and located in the name of James Marlin to be entirely in conflict with the before-recited survey.

"In testimony whereof, I have hereunto set my hand this the 29th of December, 1857.

"W. S. HUNNICUTT.

"I, W. S. Hunnicutt, a dept. surveyor for Robertson's land-district, do hereby certify that the foregoing is a true and correct statement of facts to the best of my knowledge. Given under my hand and seal this 29th December, A. D. 1857.

"W. S. HUNNICUTT,
"*Dept. Surveyor for Robertson's Land District.*'

To which the defendants objected, on the ground, among other reasons, that they were not parties or privies to said cause.

VI. In refusing to charge the jury that the concession to Sanchez authorized the owner of said concession to appropriate five leagues of the public domain; and, having shown an older survey than the survey by virtue of the concession to Basquez, the said Sanchez title is the superior title for the lands covered by it.

VII. In charging the jury on the question of limitation, and in refusing to charge that, if the jury believed from the testimony that the ancestor of the defendants, Churchill Jones, entered upon that part of the John Marlin league which is in conflict with the Basquez, as claimed by the plaintiffs, at any time before the plaintiffs or their ancestor made an entry on said Basquez, and that said defendants and their ancestor had so remained in said possession of the lands claimed by them for three years or more before the institution of suit, then they should find in favor of the defendants, Watson, Bartlett, and W. H. Jones, on their plea of limitation.

VIII. In refusing to charge the jury that, if they believed from the evidence that at the date of the purchase by Churchill Jones from the heirs of John Marlin in 1858, the said Jones had no notice by the county map, or other records, or otherwise, of any conflict of the John Marlin league with the Basquez grant, they should find for the defendants, Watson and children, Bartlett and wife, and William H. Jones, even if they should find that the location as claimed by the true location of said Basquez grant.

IX. In rendering judgment on the verdict of the jury, because the same is indefinite, uncertain, and does not find the main issue in the case; viz., how much of the defendants' land, if any, is covered by the plaintiffs' grant.

The charge to the jury complained of in the seventh assignment of error is set forth in the opinion of the court.

Mr. Levi W. Goodrich and *Mr. Matthew H. Carpenter* for the plaintiffs in error.

The papers admitted by the court below, if evidence at all, show legal title in Basquez. The right asserted by the plaintiffs is, therefore, cognizable only in a court of equity. The

concession and the final extension of title were to him, and no deed appears from him. *Hanrick* v. *Barton*, 16 Wall. 166; *Sheirburn* v. *Cordova et al.*, 24 How. 423.

It is certainly the duty of the surveyor to run around the land intended to be embraced in the survey and patent, and see that such objects are designated on it as will clearly point out and identify the boundaries of the tract, and to extend a correct description of these objects, natural or artificial, into the field-notes of the survey, in order that they may be inserted in the patent, so that the owner, as well as other locators, may have the means of knowing precisely what land is granted. If the lands cannot be identified by the calls in the grant, it is void. *Chinowith* v. *Haskell's Lessee*, 3 Pet. 92; *Henshaw* v. *Bissell*, 18 Wall. 255; *Deery* v. *Cray*, 10 id. 263; *Boardman* v. *Reed*, 6 Pet. 328; *Guilbean* v. *Mays*, 15 Tex. 414; *Booth* v. *Strippleman*, 26 id. 440; *Stafford* v. *King*, 30 id. 269; *Phillips* v. *Ayres*, 45 id. 605; *Bartlett* v. *Hubert*, 21 id. 20; *Norris* v. *Hunt*, 51 id. 609; *Anderson* v. *Stamps*, 19 id. 460; *Booth* v. *Upsher*, 26 id. 69; *Hubert* v. *Bartlett*, 9 id. 102; *Muller* v. *Landa*, 31 id. 265; *Welder* v. *Carroll*, 29 id. 317; *Williamson* v. *Simpson*, 16 id. 439; *Shipp* v. *Miller*, 2 Wheat. 316; *Johnson* v. *Paunel's Heirs*, id. 206; *Bruckner* v. *Lawrence*, 2 Doug. (Mich.) 19.

The concession authorizing the appropriation of eleven leagues was sufficient authority to the local officer to sever that quantity from the vacant public domain, and put Basquez in possession of the land so appropriated. When this is done, the floating right, evidenced by the concession, attaches to a certain specified locality, and the title is complete. *Graham* v. *United States*, 4 Wall. 259; *Hanrick* v. *Barton*, 16 id. 166.

The charge to the jury set forth in the sixth assignment of error should have been granted. *Hollingsworth* v. *Holshausen*, 17 Tex. 44; *Warren* v. *Sherman*, 54 id. 441; *Landes* v. *Brant*, 10 How. 348; *Miller* v. *Dale*, 92 U. S. 473; *Henshaw* v. *Bissell*, 18 Wall. 255.

The testimony of the witness Chriesman was hearsay, and should not have been admitted. *Shutle* v. *Thompson*, 15 Wall. 151; *Adams* v. *Swanson*, 116 Mass. 595; *Long* v. *Colton*, id. 414; *Hall* v. *Mayo*, 97 id. 416.

The question as to the competency of hearsay testimony to establish boundaries has often been judicially considered in Texas. Where a corner or marked line has been pointed out to the witness by a deceased person, who is shown to be in a position to have a knowledge of the facts, the parol declaration has been received; and where it appeared that the survey in question was one of a block of surveys, or was surveyed at the same time by the same surveyor, the plat he made, or his field-notes of surrounding or contiguous surveys, have been received to illustrate and identify the lines of the survey in question. The Supreme Court of that State has not in any instance gone beyond the rule as above stated. *George* v. *Thomas*, 16 Tex. 74; *Stroud* v. *Springfield*, 28 id. 649; *Welder* v. *Carroll*, 29 id. 317; *Evans* v. *Hurt*, 34 id. 111; *Smith* v. *Russell*, 37 id. 247; *Hurt* v. *Evans*, 49 id. 311.

The objections to Chriesman's testimony may be summed up as follows: —

Moore, whose declarations were received, was not shown by evidence *aliunde* to be in a position to have a knowledge of the facts to which his declarations relate. No line or corner, visible or imaginary, was pointed out to the witness, and he says that he never saw any. The statement testified to by him is not a declaration, but a narration of the particular facts of a then past occurrence. It does not appear that primary or direct evidence of the location of the lines and corners of the Basquez tract cannot be produced by the plaintiffs. If the evidence tends to prove any fact, it is that an actual survey was made, and not where the lines or corners were placed; and it does not appear therefrom that the land so surveyed by Moore was or is embraced in the title under which the plaintiffs claim. It is attempted by said testimony to repudiate the description in the grant, and to locate the land claimed under the same by adding to, varying, or contradicting the instrument itself. It does not appear that by proper search a tract of land cannot be found corresponding in description with every call in the plaintiff's title.

When there is only a partial conflict or interference of surveys, the statute will not run in favor of an adverse occupant under a junior title, if his possession does not extend to that

part of the land in dispute which is within the conflict. Angell, Lim., sect. 402, and numerous authorities in notes; *Trimble* v. *Smith*, 4 Bibb (Ky.), 257; *Fox* v. *Hinton*, id. 559; *White* v. *Burnley*, 20 How. 235; *Hole* v. *Rittenhouse*, 25 Pa. St. 491. The possession which the owner of the junior title has of that part of the land not within the interference, being lawful within itself, is not, by construction, extended also to a presumed unlawful trespass upon that part embraced within the elder title. For this purpose there must be an actual, visible, and exclusive adverse possession of the land in controversy. *Wheeler* v. *Moody*, 9 Tex. 377; *Gillespie* v. *Jones*, 26 id. 346; *Whitehead* v. *Foley*, 28 id. 268. Such possession, if not continuous for the full term limited by the statute, is insufficient, whether it be lost by the voluntary act of the party, or by his forcible ouster, or by a final judgment against him in a suit brought to recover the estate. *Shields* v. *Boone*, 22 Tex. 193.

Mr. Samuel R. Fisher and *Mr. Philip Phillips*, *contra.*

In *Hanrick* v. *Barton* (16 Wall. 166), relied on by the plaintiffs in error in support of their proposition that Peyton's title was an equitable and not a legal one, there was not, as in this case, a deed from the original grantee.

If, as there held, a power of attorney from La Serda to Roberts authorizing him to sell, and a substitution by Roberts of Williams, and a sale by the latter, passed a legal title, surely a sale from Basquez to Hartz, and from the latter to Peyton, passed a legal title.

But by what law or test is the title of Peyton to be adjudged an equitable one? Equitable and legal titles are founded upon the distinction between equitable and legal estates, and there cannot be an equitable estate or title in one, without a corresponding legal estate or title in another. In other words, there must be a trustee in whom the fee is vested, and a beneficiary or *cestui que trust.*

In the case at bar, where and in whom is the fee or legal estate? Where and in whom is the equitable estate? And how was the trust created?

The fee and absolute title were vested in Basquez, with the power of disposing of it when the concession was made. All the estate and interest of the government were conveyed.

Hancock v. *McKinney*, 7 Tex. 384; *Martin* v. *Parker*, 26 id. 253.

The fee, then, is not in the government nor in him; for if it passed to him, and he, having the power to do so, disposed of it in express terms by his act of sale, it can only be in the vendee. There is no room for a trust. The estate, expressly limited in terms by the act of sale or deed from Basquez, is an estate in fee; for he there declares "that he has sold, really, publicly, and in fee and for ever," &c.

At the time of the acquisition of Peyton's title, as noted by the Supreme Court of Texas in *Martin* v. *Parker* (*supra*), the common-law distinction between legal and equitable titles did not obtain.

The case at bar does not involve the question of remedy. The question is one of estate, and must be determined by the law in force when the title was acquired. *Steinbach* v. *Stewart*, 11 Wall. 576; *Hanrick* v. *Barton*, *supra*; *Robinson* v. *Campbell*, 3 Wheat. 212.

The difference between a Mexican concession or grant by sale, and a patent from the United States or a State, as noted in *Hanrick* v. *Barton*, is too obvious for comment.

The grant to Basquez being the primary title, and the extension to the land but the incident, the extension when made related to the grant and vested in Peyton the absolute title in fee, even if it did not, as we contend, pass when the grant was made.

Peyton stands in privity with Basquez, who initiated the proceedings, and though the extension of title is not to be analogized to a patent, still, if necessary, the doctrine of estoppel and relation may be invoked.

If applied for the purpose of justice in the case of a patent, where the fee resides in the government until the patent issues, it certainly should apply to a case where the government parts with all its title when a grant is made. *Barr* v. *Gratz*, 4 Wheat. 213; *Stoddard* v. *Chambers*, 2 How. 284; *Landes* v. *Brant*, 10 id. 348; *Bean* v. *Welsch*, 17 Ala. 770; *Dickerson* v. *Talbot*, 14 B. Mon. (Ky.) 60; *Cavender* v. *Smith*, 5 Iowa, 157; *Irvine* v. *Irvine*, 9 Wall. 617; *Langdeau* v. *Hanes*, 21 id. 521 *McCarthy* v. *Mann*, 19 id. 20.

The genuineness of Peyton's title was admitted; possession had been held under it for nearly twenty years, with payment of taxes. The plaintiff below stood ready to prove, and did prove to the satisfaction of the jury, its actual survey and identity on the ground. The presumption was that the survey had been made, and it was incumbent on the defendants to repel it. *Phillips* v. *Ayers*, 45 Tex. 601; *Jenkins* v. *Chambers*, 9 id. 167; *Booth* v. *Strippleman*, 26 id. 436. The action of the alcalde in extending title on the survey is not to be examined with hypercritical spirit. *Hancock* v. *McKinney*, 7 id. 384; *Hancock* v. *Horton*, 11 id. 220.

There is no patent ambiguity in the grant, but the court erroneously held that an actual survey was necessary to its validity. *Stafford* v. *King*, 30 Tex. 537; *Jones* v. *Burgett*, 46 id. 284; *Newsom* v. *Pryor*, 7 Wheat. 7.

No case in Texas or elsewhere can be produced where a grant of this character, containing a specific description of the granted premises, has been held absolutely void upon an objection *in limine*.

To have so held in this case would have been confiscation under the guise of construction. It is not necessary that the grant itself should contain such a description as will, without the aid of extrinsic testimony, ascertain precisely what is conveyed. If by such testimony it can be located, it should not be held absolutely void for uncertainty. *Blake* v. *Doherty*, 5 Wheat. 359; *Cavazos* v. *Trevino*, 6 Wall. 773; *Ragsdale* v. *Robinson*, 48 Tex. 379; *Williamson* v. *Simpson*, 16 id. 433; *Phillips* v. *Ayers*, 45 id. 601; *Johns* v. *Shutz*, 47 id. 578; *Booth* v. *Strippleman*, 26 id. 436; *Kingston* v. *Pickens*, 46 id. 99; *Jones* v. *Burgett*, id. 284; *Lohff* v. *Germer*, 37 id. 578; *Browning* v. *Atkinson*, id. 633; *Stafford* v. *King*, 30 id. 257; *Bass* v. *Mitchell*, 22 id. 285; *Mitchell* v. *Burdett*, id. 633; *Bolton* v. *Lann*, 16 id. 96; *Urquhart* v. *Burleson*, 6 id. 502.

The testimony of the witness Chriesman was clearly admissible. The Supreme Court of Texas has in a current of decisions commencing in 1856, and continuing down to the present day, held that reputation is admissible as evidence in questions of private boundary; and has given to the unsupported declarations of a deceased person, as to where a line or

corner is, the weight of common reputation, and permitted such declarations to be proved under the rule that in questions of boundary hearsay is evidence. *George* v. *Thomas*, 16 Tex. 74; *Stroud* v. *Springfield*, 28 id. 649; *Welder* v. *Carroll*, 29 id. 318; *Wheeler* v. *Hunt*, 34 id. 47; *Smith* v. *Russell*, 37 id. 247; *Evans* v. *Hurt*, id. 111; *Hurt* v. *Evans*, 49 id. 311.

In *Stroud* v. *Springfield* the following cases are cited and approved: *Speer* v. *Coate*, 3 McCord (S. C.), 227; *Blythe* v. *Sutherland*, id. 258; *Boardman* v. *Reed*, 6 Pet. 328; *Shutte* v. *Thompson*, 15 Wall. 151.

The rule established by these decisions has become so firmly engrafted upon the laws of Texas as to become a rule of property.

It has also been adopted by many other States. *Tate* v. *Southered*, 1 Hawks (N. C.), 45; *Shepherd* v. *Thompson*, 4 N. H. 213; 49 id. 230; *Powers* v. *Selsby*, 41 Vt. 289; *Higby* v. *Bidwell*, 9 Conn. 447.

Where the rules of evidence established by statute or by the decisions of the highest tribunal of a State become a rule of property, more especially in matters of real estate, they will be followed by the courts of the United States. *Waring* v. *Jackson*, 1 Pet. 570; *Hinde* v. *Vattier*, 5 id. 398; *Henderson* v. *Griffin*, id. 151; *Polk's Lessee* v. *Wendell*, 5 Wheat. 293; *Jackson* v. *Chew*, 12 id. 153; *Olcott* v. *Bynum*, 17 Wall. 44; *Lloyd* v. *Fulton*, 91 U. S. 479; *Lamborn* v. *County Commissioners*, 97 id. 181; *Orvis* v. *Powell*, 98 id. 176.

MR. JUSTICE STRONG delivered the opinion of the court.

This is an action of ejectment brought to recover the possession of four leagues of land on the east bank of the Brazos River, known as the Gregorio Basquez survey of four leagues. The defence set up against the claim of the plaintiffs was the general issue by which the title of the plaintiffs was denied, as also the wrongful entry of the defendants. The Statutes of Limitation were also pleaded.

At the trial in the Circuit Court a verdict was obtained by the plaintiffs, upon which a judgment was entered, and the defendants have brought the case here, assigning several errors to the rulings in the lower court.

Before proceeding to examine them, it is necessary to notice an objection interposed by the plaintiffs against their being considered at all.

The verdict was rendered on the 17th of February, 1877, and judgment thereon was entered on the same day. On the 19th of the same month the defendants moved for a new trial. This motion was overruled on the 20th. Two days afterwards (on the 24th) the writ of error was sued out, tested on that day. It does not appear when the writ was filed or served. A citation was also issued on the 24th of February and returned by the marshal, received in his office September 3, and served the same day.

The defendants' bills of exception upon which their assignments of error are founded were signed by the judge on the 28th of February, and filed in the cause on the 1st of March next following. This was during the term at which the cause was tried, but eleven days after the verdict was rendered. The plaintiffs' counsel was present when the bills were signed, and objected on the ground that they were not presented for signature within the time limited by the rule of the court. That rule was as follows: "No bill of exceptions will be signed unless presented to the judge within five days after the close of the trial, unless further time be allowed by the court." No objection was made to the correctness of the bills or to their signature because a writ of error had been sued out.

On the 1st of March an order was made by the court extending the time for presenting and filing the bills until that day (the plaintiffs objecting to the order), and accordingly the bills were then filed.

It is now insisted that the bills of exceptions cannot be considered a part of the record, and that they are not properly here for review. For this several reasons are advanced, the first of which is that the presentation to the judge was not in the time prescribed by the rule of the court. But the rule requiring the presentation of bills for the signature of the judge within five days is not a rule which controls his action. He may depart from it in order to effectuate justice. *Stanton* v. *Embrey*, 93 U. S. 548. It is a direction to the parties, and it expressly reserves the power to enlarge the time. It is no

doubt necessary that exceptions should be taken and, at least, noted before the rendition of the verdict; but the reduction of the bills to form, and the signature of the judge to the bills, required for their attestation, or, as said in the Statute of Westminster, "*for a testimony*," may be afterwards, during the term. In practice it is not usual to reduce bills of exception to form and to obtain the signature of the judge during the progress of the trial. Nor is it necessary. The Statute of Westminster did not require it. It would greatly and uselessly retard the business of courts were it required that every time an exception is taken the progress of the trial should be stayed until the bill could be reduced to form and signed by the judge. For this reason it has always been held that the exception need only be noted at the time it is made, and may be reduced to form within a reasonable time after the trial is over. *United States* v. *Breitling*, 20 How. 252; *Stanton* v. *Embrey*, *supra*; *Dredge* v. *Forsyth*, 2 Black, 564. The time within which the signature of the judge must be applied for, if within the term, is left to the discretion of the judge who noted the exception when it was made. It may depend much upon the nature of the bills. Some require much more time for preparation than others. It is true a judge cannot be permitted to make up a statement of facts, after the writ of error is issued, upon which the case shall be heard. *Generes* v. *Bonnemer*, 7 Wall. 564. That is quite a different matter. But when an exception has been taken at the trial and noted, reducing the exception to form afterwards and attesting it is not making a new case: it is merely verifying the case as it appeared on the trial.

It is further urged by the plaintiffs that the defendants waived their exceptions by suing out the writ of error before the signature of the judge was obtained. In support of this objection we are referred to Tidd's Practice, 863, where it is said, "If a party who at the trial of a cause has tendered a bill of exceptions, bring a writ of error before he has procured the judge's signature to such bill, he thereby waives the bill of exceptions, and will not be permitted by the court of error afterwards to tack or append the bill of exceptions to the writ of error." 4th Am. ed., from the 9th London. For this the

author relies on *Dillon* v. *Doe dem. Parker*, 1 Bing. 17; s. c. 11 Price, 100. In that case a year had elapsed after the writ of error had issued. The transcript of the record had gone into the Court of Errors. The common assignments of error had been made and issue had been joined before the plaintiff in error moved the court in error to compel a settlement of the bill in the lower court, and asked that it might be appended to the writ. In response to this motion, it was observed by two of the justices that the proper course would be to apply to the inferior court (the Court of King's Bench), which might, perhaps, make such an order, and then the bill of exceptions might be brought up by an allegation of diminution. The case cited hardly sustains the text. Only one of the judges expressed the opinion that the writ of error and the return of the record were a waiver of the bill of exceptions. But if that is the rule in the English courts, it is not imperative even there. Where the presentation to the judge has been delayed from the default of the defendant in error, or for other sufficient reasons, the Court of Errors will allow the bill of exceptions, when signed, to be tacked to the record as of the time when the record was removed. *Taylor* v. *Willans*, 2 Barn. & Adol. 845; s. c. 6 Bing. 512. The case is also reported in 4 Moo. & P. 257, where the facts are fully stated. On the trial before Chief Justice Tindal, on the 23d of December, a bill of exceptions was tendered, the substance of which was reduced to writing and given to the officer of the court before the termination of the cause, but it was not then signed and sealed. There was a verdict for the plaintiff. The defendant sued out a writ of error in the King's Bench. Subsequently, on the 11th of February following, the bill of exceptions in an amended form was settled by the counsel for the parties, and a copy was sent to the plaintiff's attorney that he might accede to its terms, or suggest alterations before it was sealed by the Chief Justice. At the same time, the defendant served a rule to transcribe the record for return with the writ of error. The bill not having been returned, the court granted an order for its return. It was argued against the rule (and *Dillon* v. *Parker* was cited in support of the argument) that the bill was waived, and that, by the writ of error and the rule to transcribe, the record had been

removed into the King's Bench. But the court, all the judges concurring, retained the order upon the attorney, holding that the Chief Justice might seal the bill. It is not, therefore, by any means settled, even in England, that suing out a writ of error is a waiver of unsigned bills of exceptions.

We know of no decision in this country that asserts or gives any countenance to such a rule, or any reason that justifies it, unless it be one in New York, to which we shall refer. True, a writ of error here, as in England, is supposed to remove the record of the court to which it is directed into the superior tribunal. But this is a mere fiction. In neither country is the record itself actually sent up. A transcript only is sent. In England, at common law, a writ of error operated as a *supersedeas* and stayed all action of the inferior court, and thence it was regarded as removing the record and ousting the jurisdiction of that court. The law there has been changed. And here, the writ is of itself no *supersedeas*. If there be no bail for a *supersedeas*, a writ does not stay the action of the trial court. An execution may be issued and executed though a writ of error is pending. Much more, it would seem, must the court to which the writ is sent have power, during the term in which the case is tried, to put its records and proceedings in form to return them in obedience to the writ. If that cannot be done, great hardship and injustice would in many cases be the result. As we have said, bills of exceptions cannot always be formally prepared until a considerable time after verdict and judgment. They may require, in some cases, a full statement of almost all that occurred at the trial. Papers necessary to be incorporated may be mislaid or withheld by the opposite party; the charge of the judge, to which exception has been taken, may not have been filed, or sickness may have interfered. Meanwhile, judgment on the verdict may have been entered, and unless the party can protect himself by a writ of error, an execution may follow. For these reasons, the universal practice is to give reasonable time to make up the bills of exceptions and obtain the signature. This is not altering the record, it is completing it. It is not exercising jurisdiction over the case. It is merely putting into form the record statement of what was done before the writ of error was sent down. In *Brown* v.

Bissell (1 Dougl. (Mich.) 273), where a bill of exceptions returned with a writ of error appeared to have been signed after the writ was sued out, it was held to be, at most, whether at common law or under the statute, a mere irregularity, which was waived by a joinder in error. *Witbeck* v. *Waine*, 8 How. (N. Y.) Pr. 433.

The remaining objection to the bills of exceptions is that they were not signed nor filed *nunc pro tunc*, but that they appear on their face to have been signed and filed ten days after the trial. We think, however, the absence of any order that the bills should have the same effect as if they had been signed and filed during the trial is not a fatal objection. The order of March 1, extending the time for signing and filing, is equivalent to such an order. And the fact that the date of the signature was the 28th of February is of no practical importance. At most it is only an irregularity. It is not a void act. Perhaps the bills would appear more regular had they been dated February 17, but they are recitals of what occurred at the trial, and they show that the exceptions were then taken — taken in time. If it be kept in mind that the judge's signature is required only for "testimony" that the exception was taken at the trial, and before verdict, it cannot be material that the testimony was given after the close of the trial, if given during the term. We do not overlook what was said in *Walton* v. *United States*, 9 Wheat. 651. We gather the facts of that case only from the opinion of the court, delivered by Mr. Justice Duvall, by which it appears that the bill of exceptions did not show that any exception was taken at the trial. That, of course, was a fatal defect. But, after having noticed that fact, he made some general observations. After stating that it will be sufficient if the exception be taken at the trial, and noted by the court with the requisite certainty, and that it may afterwards, during the term, according to the rules of court, be reduced to form and signed by the judge, he added, "But in all those cases the bill of exceptions is signed *nunc pro tunc*, and it purports on its face to be the same as if actually reduced to form and signed pending the trial. And," he said, "it would be a fatal defect if it were to appear otherwise; for the original authority under which bills of exceptions are

allowed, has always been considered to be restricted to matters of exception taken pending the trial and ascertained before the verdict."

These remarks were not necessary to the decision of the case, and they are unsustained by any authority, so far as we know, that existed when they were made. In *Ex parte Bradstreet* (4 Pet. 102), Mr. Chief Justice Marshall said, a practice to sign a bill of exceptions after the term must be understood to be a matter of consent between the parties, unless the judge has made an express order in the term allowing such a period to prepare it. No intimation was given that the signature must be *nunc pro tunc.*

Walton v. *United States* was referred to in *Law* v. *Merrills* (6 Wend. (N. Y.) 268), by one of the judges, and the language of Mr. Justice Duvall quoted, but it was unnecessary to a decision of that case. The bill there had been signed a year after the trial, by a judge who had not tried the cause. We find no case which can be regarded as an authoritative decision that a bill of exceptions, signed during the term at which the trial took place, though after the close of the trial, must be antedated to make it effective, or ordered to be filed *nunc pro tunc*, as of a time during the trial. Nor can we discover any reason for such a requirement. During the term the records of the term are before the court for amendment in matters of form, and whether a bill was signed as of a date after judgment if during the term, or antedated to a time during the trial, is a question of form only, if it appears that the exceptions were in fact taken before verdict and during the progress of the trial. Confessedly it may be signed after judgment, as of a date before, and be effective, though the date of the signature in such a case is false. Why should giving to the signature its true date destroy it? The reason why it is required that a bill shall be presented for signature during the term (except in extraordinary cases, when delay is allowed by the judge), is that the facts appearing and rulings made at the trial may be fresh in his memory. Are they any more fresh in his memory when he antedates the bill, or orders it to be filed as of the date of the trial, than when he gives to the signature and filing their true date? We cannot doubt that in a multitude of cases

bills of exceptions have been signed after judgment, and filed without any order that the signature and filing be entered *nunc pro tunc*, but, when the true time of the signature appeared, have been treated as sufficient, whenever they have shown that the exceptions were taken during the trial. And, we think, it would be a surprise to the profession, and work great wrong to suitors, were we to hold such bills invalid.

In *Neece* v. *Haley* (23 Ill. 416), exceptions were duly taken at the trial. The record showed that the bill of exceptions was signed three days afterwards, but during the term. It was held that the bill was good, and that the record need not explain the delay.

So it was ruled in *Illinois Railroad Co.* v. *Palmer* (24 id. 43), that, if the bill of exceptions clearly shows that exceptions were taken at the proper time, it is immaterial that it was not signed till some days after the trial, and that it spoke in the present tense.

In *Dean* v. *Gridley* (10 Wend. (N. Y.) 254), Savage, C. J., declared that it was not required the bill should be so drawn as to appear to have been signed upon the trial, whether it was so or not. He was speaking of the Supreme Court of Errors. See *Hallowell* v. *Hallowell*, 1 Mon. (Ky.) 130; *Hughes* v. *Robertson*, id. 215.

We pass, then, to a consideration of the assignments of error. The first raises the question whether the title which was set up in Jonathan Peyton was a legal one or merely an equity. As set out in the several bills of exceptions, it appears to have been as follows: On the 28th of September, 1830, Gregorio Basquez applied to the proper authorities of the Mexican government for a grant in sale of eleven leagues of vacant land in the department wherein Nacogdoches was situated, with the privilege of selecting them together, or separate, or in distinct places.

On the 11th of March next following, a concession was made in accordance with the prayer of the petition, and an order given to the commissioner for the partition of land, or to the alcalde of the jurisdiction, to put the petitioner into possession of the subject of the grant.

On the 20th of September, 1831, Basquez gave a power of

attorney to Don Jayme Hartz, empowering him to solicit the possession and titles to the said eleven leagues, in the place or places which best suited him (Hartz), together or separate, and empowering him also to appoint substitutes.

Two days afterwards Basquez sold and conveyed the grant for the sum of $150 to Don Jayme Hartz in fee.

On the 2d of March, 1832, Hartz, in consideration of $500 to him paid, sold the concession or grant to Jonathan Peyton, the ancestor of the plaintiffs, in fee, and substituted him as attorney. The act of sale recited the conveyance of Basquez to the vendor.

On the 7th of October, 1833, the constitutional alcalde, by a legalized act, conferred upon and put Peyton, the aforesaid attorney of Basquez, "in real, virtual, personal, and actual possession of the eleven leagues," the same which had been granted to Basquez, describing them by the situation, lines, limits, and corners as delineated in the notes of survey made by Francis W. Johnson, the principal surveyor, on pages two and following of the proceeding, with the figure thereof shown in the map thereunto annexed. The act of the alcalde also ordered that an authenticated copy of it should be delivered to the interested party that he might possess, use, and enjoy the lands sold to him, his children, heirs, and successors, or whoever of him or them might have cause, interest, or right to represent.

We are unable to see why these proceedings did not vest the legal title to the lands granted in Peyton. The possession was delivered to him, and he was instituted therein. The interest of Basquez, whatever it was, both legal and equitable, had been sold by him to Hartz, and Hartz had sold it to Peyton. The institution into possession must, therefore, have inured to the benefit of Peyton. It is a mistake to allege, as the defendants now do, that the final extension of title was to Basquez. It may be that Peyton would have held the land for the use of Basquez, had he been only the attorney of Basquez. But he was more. He was a grantee of all the Basquez right. In this particular the case is unlike *Hanrick* v. *Barton*, 16 Wall. 166. In that case, as here, there had been an extension of the possession to the attorney in fact of the original grantee of

the government, and it was held that the extension inured to his benefit, and that its legal effect was to perfect title in him. But there had been no grant of the original title to the attorney. An assertion of title in him was, therefore, a fraud upon his principal. But this court said: "We do not mean to say that the original grantee, if not prohibited by law, might not have assigned his inchoate title to a third person, nor that the title might not, by a grant in proper form, have been perfected in such assignee."

It has repeatedly been decided in Texas that purchasers under the twenty-fourth article of Mexican laws of 1825 can alienate their grants as soon as the concession has been made to them, before the land was selected, or the title of possession was issued. *Ryan* v. *Jackson*, 11 Tex. 391; *Clay* v. *Holbert*, 14 id. 189. In *Martin* v. *Parker* (26 id. 254), it was held that a formal act of sale by the original grantee, with a power to the purchaser to obtain the title of possession, must be held to constitute the purchaser the absolute owner of the property when he is put into possession of the land, and the evidence of title by the proper officer of the government. Such is this case. The first assignment of error, therefore, cannot be sustained.

Nor can the second. The original grant, it is true, did not locate the subject of the grant. It contemplated a selection and location thereafter, and, when these were made, as the jury found, and the title of extension was given, the title was complete. There was enough in the extension, coupled with the notes of the surveyor (made a part of it), to enable the location to be identified. A more important question is raised by the third and fourth assignments.

It was a very material inquiry at the trial, where the Basquez four leagues had been located. The title-papers described the location as beginning at a stake marked P, upon the left margin of the river Brazos, running thence north 71 degrees east, to a corner; thence by other courses back to the river, and thence up the river to the place of beginning. Such was the report of the survey. The starting-point was a stake, perishable, of course, which, as might have been expected, would not be found after a lapse of forty years. But the survey was

not a mere chamber one. There was evidence that it had actually been made upon the ground, and the court submitted to the jury to find whether it had or not. No exception was taken to this submission, and the jury found that an actual survey had been thus made. Its location was the matter chiefly in controversy. The claim of the plaintiffs was that its upper or north line, described as beginning at a stake marked P on the left bank of the Brazos River, running thence by a course north 71 degrees east, was the upper line of the Austin & Williams reserve, and identical with it to the extent of the Basquez survey. To prove this they introduced the testimony of Horatio Chriesman, against the objection of the defendants. Chriesman had been a surveyor under F. W. Johnson, principal surveyor of the Austin & Williams lands in the reserve, and William Moore, deceased, had been another deputy. The two deputies, in 1833 and 1834, had been engaged in surveying in the reserve other lots on the left side of the Brazos River. Neither of them was on the Basquez tract, or on any line of it. Chriesman was laying out tracts fronting one thousand varas on the river. By direction of Johnson, these surveys were to include all the river-front between the upper line of the Ruiz (a grant located on the lower line of the reserve) and the lower line of the Basquez four-league grant. Moore was surveying in the rear. During the time that Moore and the witness were thus engaged surveying in the reserve, and perhaps before that time, as he testified, he was allowed to state that Moore informed him that he had made the survey of the Basquez four-league tract; that the upper line of said grant began on the east bank of the Brazos River, at the point where the upper line of the reserve began; and that the upper line of the Basquez ran north 71 degrees east with the reserve line the full distance of the Basquez line, and that the upper line of the Basquez and the upper line of the reserve were the same to the extent of the Basquez line. It was this testimony, and other of a similar nature, to which the defendants objected, and to the admission of which they excepted.

It is to be noticed that the witness himself, as he expressly stated, had no knowledge of the location or lines of the Basquez survey, except what Moore had told him. The declarations of

Moore were made, not when he was pointing out the boundaries of the Basquez survey, but when he was at a distance from the place of beginning of that survey and from its upper line. That Moore had made the survey, or ever been upon its upper line, or on the upper line of the reserve, is proved only by his assertion, which the court allowed to be given in evidence. There was no such proof *aliunde*. Whether he had any knowledge of the facts whereof he spoke to Chriesman, is known only from his own statement.

Again, Moore's declarations had no reference to reputation in the neighborhood. They are not to be confounded with proof of reputation, — proof of what the community thought, believed, or said. As repeated by the witness, they were mere hearsay, the unsworn declarations of a deceased person respecting a particular fact not of a public nature. We do not question that such declarations of reputation respecting ancient public boundaries are admissible, and they have sometimes been admitted in controversies respecting private boundaries. But they are admissible in only a limited class of cases, — a class much more limited than that in which such evidence is offered to prove reputation of public boundaries. Proof of reputation is open to rebuttal by witnesses. Not so with declarations of a particular fact respecting a private boundary. They are, therefore, receivable only when made coinci dently with pointing out the boundaries and generally as part of the *res gestæ*.

In *Ellicott et al.* v. *Pearl* (10 Pet. 412), we find a case which bears strongly on the present. In that case, which was a writ of right for a tract of land, in which the location of a survey was a matter in controversy, a witness was offered to prove that one Moore, who was dead, but whose name was put down as one of the chain-carriers in making the original survey, and who was subsequently present when lines were run on the same land, had declared that a certain corner was the corner made by the surveyor when the original survey was made and the line was run for that survey. The evidence was rejected, and, this court ruled, correctly rejected, though the declarations offered were made by one who was proved by other evidence to have assisted in running the line. This case is instructive,

and we believe it is in harmony with the rule generally enforced in this country. It certainly is in accord with the ruling of the English courts.

It is true that in several States of the Union decisions have been made recognizing the admissibility of declarations of deceased persons, even though they were statements of particular facts and in regard to mere private boundaries; but many of them, perhaps most of them, were admissible on other grounds, either as parts of the *res gestæ* or declarations of parties in possession. We think such is not the preponderant weight of decision. In Massachusetts, where the subject has been much discussed, it is held that, to be admissible, such declarations must have been made by persons in possession of land and in the act of pointing out their boundaries. *Bartlett* v. *Emerson*, 7 Gray (Mass.), 174; *Daggett* v. *Shaw*, 5 Metc. (Mass.) 223. And again, in *Long* v. *Colton* (116 Mass. 414), when it was said that it is an element not to be disregarded, especially where the question is one of private boundaries, that the declaration was made while in the act of pointing out the boundaries, on the declarant's land. The declaration derives its force from the fact that it accompanies and qualifies an act, and is thus a part of the act. A similar ruling was made in *Bender* v. *Pitzer*, 27 Pa. St. 333.

We will not undertake to review the vast number of decisions of State courts upon this subject. It would greatly protract this opinion. Some things may be deduced from them, which, though not universally recognized, are the conclusions to which, we think, a great majority of them lead. In questions of private boundary, declarations of particular facts, as distinguished from reputation, made by deceased persons, are not admissible unless they were made by persons who, it is shown, had knowledge of that whereof they spoke, and who were on the land, or in possession of it when the declarations were made.

To be evidence, they must have been made when the declarant was pointing out or marking the boundaries or discharging some duties relating thereto. A declaration which is a mere recital of something past is not an exception to the rule that excludes hearsay evidence. Still, if a different ruling has been

made in the State of Texas, and has become a rule of property there, applicable to the determination of controversies respecting disputed boundaries, we should feel constrained to apply the Texas rule to this case. We have, therefore, carefully examined all the decisions of the Supreme Court of that State which relate to the subject. The result has been to convince us that there is no essential difference between the rule as there held and the general rules held by the American courts. Hearsay evidence is admitted in questions of boundary to establish old boundary lines, even when private; but it is under restrictions, and the restrictions appear to be the same as those which are recognized elsewhere.

The first case is *George* v. *Thomas*, 16 Tex. 74. What was there ruled was that the declarations of a public surveyor, made while he was making the survey to establish the dividing line, were admissible. They were a part of the *res gestæ*. This is the leading case to which the later cases refer, and upon which they are generally rested. The opinion cites *Blythe* v. *Sutherland*, 3 McCord (S. C.), 258. In that case the declarations of a deceased surveyor, who was proved by a witness to have run the line originally, were admitted in evidence. But they were declarations made while the surveyor was pointing out the line and showing the monuments. *Stroud* v. *Springfield* (28 Tex. 649) goes no farther. The evidence offered in that case was rejected. The court, however, referred to *Speer* v. *Coate* (3 McCord (S. C.), 227), where the court had said in reference to the declarations of a deceased chain-carrier *who had pointed out to the witness a corner tree of the survey*, "it cannot be doubted at this day that the declarations of deceased persons *who shall appear to have been in a situation to possess the information*, and are not interested, shall, on a question of boundary, be received in evidence." Even this was not declared to be an accepted rule in Texas, though the chain-carrier who aided in the survey had actually pointed out a corner.

The next case is *Welder* v. *Carroll*, 29 Tex. 317. It decided nothing more than was ruled in the former cases. Indeed, while the court said, "If the locality of a boundary line can be proved by witnesses, who can, from their personal knowledge, or on information derived from general reputation, or from its

having been pointed out to them by the surveyor by whom it was run, or others who were present at the time, or cognizant of the fact, it will fix and mark its position." But at the same time the court rejected the deposition of a witness tending to prove the locality of the line from information given him by a surveyor, remarking that "while, as heretofore held by this court, hearsay evidence to establish ancient boundaries is, under proper circumstances, admissible, it should be closely scrutinized and received with proper caution." And it was held that the evidence was much too vague and uncertain in respect to the locality of the line of which the witness spoke, as well as in respect to the source of his information, and the time and circumstances under which he acquired it.

The next case is *Evans* v. *Hurt and Others*, 34 id. 111. It decides that declarations of a former owner, since deceased, who, while in possession of and claiming the land, pointed out his corner and line to the deposing witness, are evidence of the boundary in behalf of the parties claiming under him. This is the rule as held in other States. The court also decided that the declarations of a son of a former owner who pointed out the disputed line to the witness were inadmissible; but the case does not show what they were, nor under what circumstances they were made. This case came again before the court, and it is reported in 49 id. 311. The report, however, contains nothing more definite than what appears in 34 Texas.

The only other case which we have found or to which we have been referred is *Smith* v. *Russell*, 37 id. 247. In that case it appeared that the lower court had permitted the defendants to prove that one of the original chain-carriers, who was dead at the time of the trial, had pointed out to the witness the place of the corner. The Supreme Court held that the evidence was properly admitted, with the general remark that "the declarations of deceased witnesses may be proved to fix the location of corners and lines," citing *Stroud* v. *Springfield* and *Welder* v. *Carroll*. From a review of all these cases it is quite obvious that the rule in Texas is not different from that which we have endeavored to show is the general American rule, the guarded rule we have heretofore stated.

Our conclusion, therefore, is that the fourth and fifth assign-

ments of error must be sustained, and that the answer of Chriesman to the fourth, ninth, and nineteenth interrogatories, as well as all the declarations of Moore, were erroneously received.

We discover no error in the admission of the evidence set out in the fourth bill of exceptions. The documents were certainly evidence against one of the defendants.

Nor can the sixth assignment of error be sustained. The survey made under the Sanchez concession was not the completion of his title. It did not identify the subject of the concession until it was accepted by the government, and until the title of possession was given. That was issued Oct. 19, 1833, after the Basquez concession had been consummated.

The seventh assignment relates to the charge given to the jury respecting the Statute of Limitations. To understand this it is necessary to refer to some of the facts that appeared in evidence. It appeared that in 1835 John Marlin, as a colonist, obtained a complete grant from the Mexican government of one league, part of which interfered with the Basquez four-leagues tract. It appeared also that the defendants, Watson and his children, Bartlett and his wife, and W. H. Jones, having shown title in themselves to the several tracts they claimed, by regular transfer from the sovereignty of the soil, gave evidence tending to show that their ancestor, Churchill Jones, in 1855 or 1856, took actual possession of that part of the Marlin league which interfered with the Basquez grant, built a mill and other improvements thereon, and that the possession had been kept up exclusively by said defendants and those under whom they hold, down to the trial. This possession they claimed to be a defence. It appeared, however, that in 1858 the plaintiffs' ancestor entered on the Basquez grant, but not on the interference, and made a lease to James Marlin, permitting him to occupy three hundred and twenty acres. Marlin has ever since resided there, holding as tenant under the plaintiffs or their ancestor.

The charge of the court was as follows: —

"The facts, as I understand the defendants to claim them, are that in 1855, under the Marlin title, and in 1856 or 1857, under the Sanchez title, they took actual possession of their lands lying within the conflict.

"From that date the Statute of Limitations began to run in their favor for the lands embraced within their title as against the Basquez title. If three years elapsed before they were ousted by a superior possession, then their occupancy for three years makes a complete bar to any recovery by the plaintiffs.

"But the plaintiffs claim that in May, 1857, before the defendants had been in possession for the period of three years of any of the lands within the conflict, their possession was interrupted by the entry upon the Basquez grant of James Marlin as the agent for Mrs. Eberly.

"If you find this fact to be as the plaintiffs claim, that James Marlin entered upon the Basquez grant in 1857 as the agent for Mrs. Eberly, claiming title to the whole in her name, we instruct you that for that time the possession of the defendants — they holding under a junior title — was restricted to the lands actually occupied by them, and could not be extended by construction to the bounds called for by their paper title.

"From Jan. 28, 1861, to the 30th of March, 1870, the Statute of Limitations in this State was suspended. No extension, therefore, of the actual possession of defendants between these dates would avail them unless held for three years after the statute had again commenced running, and before the commencement of this suit."

It is this instruction of which the defendants complain. But we think it was correct. It was in accordance with the doctrine asserted in *Clarke's Lessee* v. *Courtney* (5 Pet. 319), and generally recognized. It is true that when a person enters upon unoccupied land, under a deed or title, and holds adversely, his possession is construed to be coextensive with his deed or title, and the true owner will be deemed to be disseised to the extent of the boundaries described in that title. Still, his possession beyond the limits of his actual occupancy is only constructive. If the true owner be at the same time in actual possession of part of the land, claiming title to the whole, he has the constructive possession of all the land not in the actual possession of the intruder, and this, though the owner's actual possession is not within the limits of the defective title. "The reason is plain. Both parties cannot be seised at the same time of the same land under different titles.

The law, therefore, adjudges the seisin of all that is not in the actual occupancy of the adverse party to him who has the better title." These distinctions are clearly shown in the cases. One who enters upon the land of another, though under color of title, gives no notice to that other of any claim, except to the extent of his actual occupancy. The true owner may not know the extent of the defective title asserted against him, and if while he is in actual possession of part of the land, claiming title to the whole, mere constructive possession of another, of which he has no notice, can oust him from that part of which he is not in actual possession, a good title is no better than one which is a mere pretence. Such, we think, is not the law. When the owner of the Basquez title entered upon the tract, took actual possession of a part by his tenant, and retained it, claiming the whole, the law gave to that owner the constructive possession of all that was not in the actual adverse possession or occupancy of another.

In *Altemus* v. *Long* (4 Pa. St. 254), it was ruled that though actual possession under a junior title of part of a tract of land, which interfered with an older grant, gave possession of the whole to the holder of the junior title, yet a subsequent entry of the true owner upon any part of his land was an ouster of the intruder from what he had in constructive possession merely. We know of no authoritative decision that is in conflict with this.

It is sufficient to say of the eighth assignment of error that it is not sustainable. The answer to the defendants' point was clearly correct.

The remaining exception is to the sufficiency of the verdict. It is said it was "indefinite, uncertain, and did not find the main issue; viz., how much of the defendants' land, if any, is covered by the Basquez grant"? This is not necessary for us now to discuss. It may be the verdict was not sufficiently certain, but as the case goes back for another trial, the matter is of no importance now.

Judgment reversed and cause remitted for a new trial.

MR. JUSTICE FIELD and MR. JUSTICE BRADLEY dissented.

DRAPER v. DAVIS.

Where no security having been taken at the time of entering an order allowing an appeal from a decree passed by the Supreme Court of the District of Columbia sitting in general term, the appellant, within the time limited by statute, filed with the clerk a bond with sureties, conditioned according to law, and approved by a judge of that court, by whom, on the same day, a citation was signed, — *Held*, that the power of the judge over the appeal and the security was thereupon, in the absence of fraud, exhausted, and that the control of the *supersedeas* as well as of the appeal was transferred to this court.

APPEAL from the Supreme Court of the District of Columbia.

Mr. William A. Meloy moved for a writ of *supersedeas*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The final decree in this cause was rendered April 30, 1878. An order was entered, May 7, on the minutes of the court below, sitting in general term, allowing an appeal to this court, but no security was then taken, either for costs or to obtain a *supersedeas*. On the 29th of June, being the sixtieth day after the rendition of the decree, a bond with sureties in the penal sum of $1,000, conditioned according to law for a *supersedeas* was approved by one of the justices of the court below, and filed with the clerk. There is no allegation that the approval of this bond was procured by fraud. On the same day the same justice signed a citation, which was served July 8. The taking of this security was not the act of the court, but of the justice. On the twentieth day of that month, the same justice, being satisfied that the bond he had taken and approved was "insufficient and inadequate security," "ordered that the appellant, within twenty days, . . . file an additional bond in the penalty of $3,000, with good and sufficient surety to be duly approved, and upon such notice as is required under rule 116 of this [the Supreme Court of the district] court." Within the time required by this order, the appellant presented to the justice for approval an additional bond for the prescribed amount; but it does not appear that it was ever accepted. The appellant fearing, as he alleges, that the court below will proceed to carry its decree into effect pending this appeal, now

asks that a writ of *supersedeas* may issue to stay any such proceeding.

When the original bond of $1,000 was accepted by the justice and the citation signed, an appeal was allowed and security taken, which operated as a *supersedeas*. That transferred the jurisdiction of the suit appealed to this court. As this allowance was the act of the justice of the court and not of the court itself, no such question is presented as was decided in *Goddard* v. *Ordway* (101 U. S. 745), where we held that if the allowance was the judicial act of the court in term time, it might, like any other order in the suit, be set aside on proper showing during the term. The power of the justice over the appeal and the security, in the absence of fraud, was exhausted when he took the security and signed the citation. From that time the control of the *supersedeas* as well as the appeal was transferred to this court, and even here, as we held in *Jerome* v. *McCarter* (21 Wall. 17), in the absence of fraud, the action of the justice or judge in accepting the security, within the statute and within our rules adopted for his guidance, was final, so far as it depended on facts existing at the time the security was accepted. It follows that the *supersedeas*, which resulted from the taking of the security on the 29th of June, is still in force and has never been vacated. Consequently the court below is without power at this time to proceed with the execution of the decree appealed from, and we will presume that upon an intimation of that kind from us it will not attempt to do so.

Should an application be made to us to increase the security on the ground of a change "in the circumstances of the case, or of the parties, or of the sureties on the bond," "so that security which was good and sufficient" at the time it was taken "does not continue to be so" (*Jerome* v. *McCarter*, *supra*), or to set aside the bond which was accepted on the ground that its acceptance was procured by fraud (*Railroad Company* v. *Schutte*, 100 U. S. 644), we can then determine whether the *supersedeas* now in force shall be vacated; but on the case as it now stands we think the court below is without power to proceed in the execution of the decree which has been appealed from.

Motion denied, without prejudice to its renewal, should it be necessary.

UNITED STATES v. ATHERTON.

1. A bill in chancery to set aside a judgment or a decree of a court of competent jurisdiction on the ground of fraud must set out distinctly the particulars of the fraud, the names of the parties who were engaged in it, and the manner in which the court or the party injured was misled or imposed on.
2. A bill to set aside or annul a patent of the United States for public lands, or to correct it on account of fraud or mistake, must show, by like averments, the particulars of the fraud, and the character of the mistake and how it occurred.

APPEAL from the Circuit Court of the United States for the District of California.

The facts are stated in the opinion of the court.

Mr. William J. Johnston and *Mr. James K. Redington* for the appellant.

No counsel appeared for the appellees.

MR. JUSTICE MILLER delivered the opinion of the court.

This was a bill in chancery, brought in 1877 under the direction of the Attorney-General, by the attorney of the United States for the District of California, as well on behalf of the United States as of certain settlers and pre-emptors upon the public lands described in the bill.

Its object is to set aside a decree of the District Court for that district, rendered, on appeal, in 1860, confirming a claim which had been formally passed upon by the board of commissioners for the settlement of private land-claims in California.

The history of the case given by this bill is that the claim was originally presented to the board of commissioners as a Mexican grant, and confirmed by that board. On appeal to the District Court, that order was reversed, and the claimant's petition dismissed.

About four years after this, a grantee of the claimant filed a bill of review in the District Court, which set aside its former order of dismissal, and affirmed the order of the board of commissioners confirming the grant. Something of a history of the origin of the grant is given in the bill, from which it would

appear that it was founded in forgery and was otherwise illegal; and, certainly, on the face of this bill, if it were an open question, the title could not be sustained.

But before we can reach this inquiry, it is necessary to get rid of the decree of the District Court. That the board of commissioners and the District Court had jurisdiction, the one original and the other by appeal, of this claim is not doubted. It is not denied by counsel, nor can it well be doubted, that the District Court had jurisdiction by bill of review in a proper case to set aside and correct its former decree. The present bill does not set out that bill of review, or even its substance. It does not show whether any defence was made to it by the United States, or any process served on any of its officers. It gives no more of the proceedings in that case than it chooses, and this is scant indeed. The case having been heard on demurrer to this bill which was dismissed, every presumption not inconsistent with its allegations is to be made in favor of the decree of the District Court. It is, therefore, to be presumed that, on the questions raised by the bill of review, there was a full and fair hearing, and that the rights of the parties were duly considered.

The only impeachment of that decree is in a single paragraph of the present bill, which reads as follows: "And your orator charges that the action of said United States District Court for the Southern District of California in the premises, in setting aside and vacating its former decree and confirming said claim, was irregular and without authority of law, and that said former decree rejecting said claim had become final."

A decree of a court of record is not to be set aside seventeen years after it has been rendered, because it was irregular, or erroneous. We have already said that the court had jurisdiction of the matter. If its action was in any other respect without authority of law, it surely should have been shown what that was. The decree rejecting the claim became final in the sense that it had settled the rights of the parties; and it, like any other, was subject in a proper case to be opened by a bill of review within five years after it had been passed. There is no allegation of fraud in procuring it; no imputation is made upon the court.

The present bill avers that no new testimony was offered on the hearing of the bill of review, but that the latter was founded on the allegation that the former decree was erroneous, and ought to be reversed for error apparent in the record. It was so reversed, and the decree ultimately rendered simply confirmed the action of the board of commissioners.

It is impossible to hold that such a decree should be opened for a new hearing on such allegations as these, so long after it was made. No fraud is charged against it; no error of law pointed out; no want of jurisdiction asserted. There is but a loose, disconnected effort to show that, if another hearing could be had, the result would be different.

The bill also alleges that the patent issued by the United States does not conform to the survey which was finally approved in the surveyor's office. This patent bears date Feb. 16, 1875, and the present bill was filed two years after. The discrepancy alleged between the amount of land covered by the survey and that covered by the patent is very large. The bill was filed within a reasonable time after the patent issued. We should be very much inclined to sustain any bill showing such a squandering of the public land if the allegations had been sufficiently specific to call upon the defendant to answer. Such a bill must rest, however, on the ground of fraud or mistake, and it is too clear for argument that it should set out the particulars of the fraud, or the manner in which the mistake occurred.

No copy of the patent is exhibited, nor of the survey with which it is said to differ.

There is only the general allegation that certain persons, not named therein, conspired together, and by false and fraudulent representations and suppression of facts imposed upon the officers connected with the land-office at Washington, and fraudulently procured the patent to be issued.

No names of the parties who committed the fraud, no names of the persons or designations of the officers imposed on, are given. It is at war with the whole character of proceedings in courts of equity to call in aid its extraordinary power to set aside on these allegations such a solemn public record as a patent of the United States.

We had occasion to discuss this matter so recently in *Marquez* v. *Frisbie* (101 U. S. 473), that we will content ourselves with a reference to that case.

It is urged that, after the court had sustained a demurrer to the bill, the complainant asked leave to amend; which was refused, on the ground that no amendment could be made which would justify the relief prayed. The right to amend after a demurrer has been sustained must rest largely, if not wholly, in the discretion of the court; and while we are not prepared to hold that in no case will its action in the matter be reviewed here, we have no hesitation in saying that the abuse of this discretion must be made plain to authorize us to do so. In the case before us, there is no suggestion of the nature of the amendment proposed to be made. No amendment was offered for the consideration of the court, nor do we know in what particulars the parties desired to amend. We have no foundation, therefore, on which to affirm that the court erred in refusing the request.

Decree affirmed.

DENSMORE v. SCOFIELD.

Reissued letters-patent No. 2261, dated May 29, 1866, issued to James Densmore and Amos Densmore for "a new and useful improved oil-tank car for carrying petroleum and other like substances in bulk," are void, — the alleged invention described in the specification being destitute of utility and novelty.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

The facts are stated in the opinion of the court.

Mr. J. C. Clayton and *Mr. A. Q. Keasbey* for the appellants.
Mr. George Willey, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is an appeal from a decree dismissing the complainant's bill, brought upon a reissued patent issued to James Densmore and Amos Densmore May 29, 1866. The summation and claims, as set forth in the reissue, are as follows: —

"The nature of our invention consists in combining two large, light, tight, firm, stout tanks with an ordinary railway car, making the tank practically a part of the car, so as to carry the desired substance in bulk in the car itself, or in a permanent fixture or part thereof, instead of in barrels, casks, hogsheads, tierces, or other movable vessels or packages, as is now universally done on railway cars, and thereby save carrying the weight of the barrels, casks, hogsheads, tierces, or other movable vessels or packages.

"What we claim as our invention, and desire to secure by letters-patent, are, —

"*First*, The two tanks B, B (or their equivalent), when constructed and operating in combination with an ordinary railway car, substantially as and for the purposes set forth.

"*Second*, The two tanks B, B (or their equivalent), when set directly (or nearly so) over the car trucks, and when constructed and operating in combination with an ordinary railway car, substantially as and for the purposes set forth.

"*Third*, The frames C, C, C, C, the bolts 1, 2, 3, and 4, and the cleats H, H, H, H, when constructed and operating in combination with tanks B, B, the man-holes and manheads D, D, and the faucets E, E, and the runway G, when constructed and arranged in combination with tanks B, B, and an ordinary railway car, substantially as and for the purposes set forth and described."

The bill alleges infringement, and prays for an account of profits and a decree for a perpetual injunction, and for such further relief as may be deemed proper.

Among other defences, the answer denies infringement, and sets up that the reissued patent is too broad, and is, therefore, void.

We pass by these topics, because we deem it proper to dispose of the case upon a more radical and comprehensive objection.

A witness, called by the appellees, testified that he was largely engaged in shipping petroleum, from 1861 to 1872. His language is: —

"In 1863, and prior to this and after, I shipped large quantities of it in old whaling casks holding from one and a half to eight and ten barrels each. I shipped a great many thousands of barrels in said casks, which were sent forward, returned empty, refilled, and forwarded again.

"I attach two leaves of my shipping-book, showing some shipments in casks and return casks in 1868; they are correct.

"My practice was to spike down cleats to prevent the casks from shifting. In nearly every shipment there were small and large casks as above. The casks would go to and fro on the railroad many times, carrying oil, and returning in the same cars empty to be filled and shipped again by me."

Another witness testifies "that he has been general freight agent on the Lake Shore and Southern Michigan Railway and its predecessors for about twenty years. That all this time he has been familiar with the practice and usage in railways as to loading, and that it has always been their practice or usage to place or distribute loads so that they should rest, as far as possible, over the trucks."

A third witness, speaking of wooden tanks like those of the complainants, says: —

"During the year 1871, their use was discontinued, because of the large percentage of leakage, and their consequent liability to be burned up; and, in case of accident on the railroad, if a tank was thrown off a car and it was destroyed, a fire was almost certain to result from the accident. A single iron tank built in boiler shape, and nearly as long as a car, and placed horizontally on the car, was substituted then.

"*Q.* 'State whether they use that description of tank down to the present time.'

"*A.* 'That kind of tank car is still in use, and is giving universal satisfaction because of being tight, little or no leakage, and the liabilities to fire are less; and, in case of accident, the tank is of sufficient strength to even be thrown off a car without injury.'

"*Q.* 'State whether or not tanks of the kind described in the defendants' patent have gone into disuse in the carrying of petroleum generally.'

"*A.* 'So far as I know, they have.'

"*Q.* 'In loading freight cars, what has always been the practice and custom in reference to loading over the trucks where the weight can be thus distributed?'

"*A.* 'It is the universal custom, so far as is possible, to place the weight over the trucks.'"

These witnesses are unimpeached and uncontradicted.

This testimony leaves nothing of the substance of the plaintiffs' alleged invention. No one, we apprehend, would seriously contend for a moment that what is left is sufficient to constitute the basis of a valid patent. *Brown* v. *Piper*, 91 U. S. 37, and the authorities there cited. But, irrespective of this testimony, and of any testimony, upon looking this reissue in the face, and examining its several claims by their own light. we find nothing that brings any of them within the sphere of what is properly patentable. There is no novelty and no utility. It does not appear (to use the language of appellants' brief) that there was "a flash of thought" by which such a result as to either was reached, or that there was any exercise of the inventive faculty, more or less thoughtful, whereby anything entitled to the protection of a patent was produced. It strikes us that the entirety and all the particulars of the summary and the claims are frivolous, and nothing more.

Patents rightfully issued are property, and are surrounded by the same rights and sanctions which attend all other property. Patentees as a class are public benefactors, and their rights should be protected. But the public has rights also. The rights of both should be upheld and enforced by an equally firm hand, wherever they come under judicial consideration.

Decree affirmed.

UNITED STATES v. SCHURZ.

1. The Supreme Court of the District of Columbia is authorized to issue the writ of *mandamus* as an original process in cases where, by the principles of the common law, the petitioner is entitled to it.
2. When a patent for a part of the public lands has been regularly signed, sealed, countersigned, and duly recorded, the patentee has a perfect right to the possession thereof.
3. In the progress of the proceedings to acquire, under the laws of the United States, a title to public land, the power of the Land Department over them ceases when the last official act necessary to transfer the title to the successful claimant has been performed.
4. Title by patent from the United States is title by record, and the delivery of the instrument to the patentee is not, as in a conveyance by a private person, essential to pass the title.

5. Therefore, when the officers whose action is rendered by the laws necessary to vest the title in the claimant have decided in his favor, and the patent to him has been duly signed, sealed, countersigned, and recorded, the title of the land passes to him, and the ministerial duty of delivering the instrument can be enforced by *mandamus*.
6. An acceptance of the grant will, in such case, be presumed from his efforts to secure the favorable action of the department, and especially from his demand for the possession of the patent.

ERROR to the Supreme Court of the District of Columbia.

This is a petition for a *mandamus*, filed in the Supreme Court of the District of Columbia, Oct. 11, 1879. It alleges that the relator, Thomas McBride, was, in 1862, possessed of all the qualifications necessary to entitle him to pre-empt one hundred and sixty acres of the public lands of the United States; that he, in that year, settled upon a tract of public land known as the S. ½ of the N. E. ¼ and lots 1 and 2 of section 6, T. 3, S. of R. 5 W., situate in the county of Tooele and Territory of Utah, containing a little less than one hundred and sixty acres, with intent to appropriate it under the laws of the United States, and has continuously inhabited, occupied, and cultivated it; that he, May 31, 1869, in due form and time, made, at the land office in Salt Lake City, a homestead entry of it; that he occupied, cultivated, and resided upon it for more than five years thereafter, and, June 15, 1874, made due proof thereof, paid the fees, and received a final certificate therefor; that his said proofs and papers were duly forwarded to the Commissioner of the General Land-Office, who found them to be in all respects in compliance with law, and such as to entitle the relator to a patent; that, in accordance with that finding, a patent for the tract was, Sept. 26, 1877, duly signed, sealed, and, by the Recorder of the General Land-Office, countersigned and recorded in the proper land records of the United States; that it was, Oct. 3, 1877, transmitted by the commissioner to the local land-officers at Salt Lake City, with instructions to deliver it to the relator, and was received by them; that he appeared at said land-office, and demanded of them to deliver the patent to him; that they refused to do so, because they had been instructed by the commissioner, Oct. 14, 1877, to return it; that it was so returned Oct. 22, 1878, and was then in the Department of the Interior, subject to the control of the Secretary of

the Interior; that Carl Schurz is such Secretary; and that the relator, Oct. 6, 1879, demanded of him, at his office in the Department of the Interior, the delivery of said patent, but the Secretary, on the tenth day of that month, absolutely refused to deliver it. The petition prays that the writ of *mandamus* issue, directing the Secretary to deliver the patent to the relator.

The relator, pursuant to leave of the court, filed, Oct. 21, 1879, a supplemental petition.

The Secretary filed his answer on the twenty-fourth day of that month, setting up that the lands claimed by the relator were, at the time of his entry, within the incorporated limits of the city of Grantsville; that, without knowledge by the register of the local land-office that the tract was within those limits, the entry was admitted; that in 1874 the relator made final proof thereof; that in February, 1877, the mayor and corporate authorities of Grantsville applied to the register to make entry of its town site under the act of March 2, 1867; that their application included the land in question; that upon his refusal to permit the entry while the land was included in that of McBride, application was made, Feb. 24, 1877, to have the entry cancelled, as illegally and improvidently allowed, which application was duly forwarded by the register to the Commissioner of the General Land-Office; that prior to regular action thereon a patent was prepared, in September, 1877, signed and sealed, and transmitted on the third of the following month to the register, for delivery to McBride upon the surrender of the duplicate receipt; that afterward, upon taking up the record of contest for examination, the commissioner, discovering that the patent had been improvidently prepared and transmitted, ordered its recall; that it was thereupon returned by the register, no demand having been made for its delivery at the date of the receipt of the commissioner's instructions; that, upon the examination of the record of contest, the claim of McBride to the land was rejected by the commissioner, which rejection was, on appeal by the relator, affirmed by the acting Secretary of the Interior, and afterward by the respondent on review. The undelivered patent was then regularly cancelled, together with the entry upon which it was based.

The answer of the Secretary was accompanied by certain exhibits. The relator filed a replication thereto.

The following agreed statement of facts was signed by counsel for the respective parties: —

"*Agreed Statement of Counsel.*

"In the Supreme Court of the District of Columbia, this fourteenth day of November, 1879.

"THE UNITED STATES, *ex relatione* THOMAS MCBRIDE, *vs.* CARL SCHURZ, Secretary of the Department of the Interior.	At law. No. 21,200.

"Be it remembered that on the hearing of this cause before the Supreme Court of the District of Columbia, sitting in general term, on the twenty-eighth day of October, 1879, it was conceded by both parties that all the allegations of the original petition were true, except the one that the premises named in the petition were in 1862 subject to pre-emption filing or homestead entry.

"It was also conceded that the case relating to said premises, set out in the answer of respondent, had been appealed from the decision of the Commissioner of the General Land-Office to the Secretary of the Interior, and was pending before the said secretary at the time the demand for said patent was made on him, as set forth in the said original petition of relator, and for some days thereafter, and that at the time of said demand, and for some days thereafter, the said patent was, with the papers in said case, as an exhibit in said case, in the office of the Secretary of the Interior, and was not in the office of the Commissioner of the General Land-Office.

"It was also conceded that the incorporated town of Grantsville, set forth in the answer of the respondent, was in fact the incorporated city of Grantsville, and that it was incorporated by the territorial legislature of Utah on the twelfth day of January, 1876, and that said act should be treated as referred to and made a part of this case.

"All other matters in said case stood upon the original and supplemental petition, the answer of respondent, and the replication thereto. There was no other or further proof or evidence offered by either party.

"One of the rules of this court is as follows: —

"33. The joinder in issue may be —

"'The plaintiff joins issue upon the defendant's first plea.

"'The defendant joins issue upon the plaintiff's replication to the first plea.'

"And this form of joinder shall be deemed to be a denial of the substance of the pleading to which it relates, and an issue thereon.

"And thereupon the said court, upon the tenth day of November, 1879, upon the evidence and pleading aforesaid, gave judgment for the said respondent.

"The foregoing facts are stipulated to be a full and true statement of this case, and made part of the record therein.

"Nov. 14, 1879. "W. H. SMITH,
"*Att'y for Plff.*
"U. J. BAXTER,
"*Of Counsel for Respondent.*

"Whereupon the court orders the said stipulation to be made of record in the case."

Instead of an alternative writ of *mandamus*, a rule upon the Secretary to show cause was granted by the court. The case was heard upon the pleadings and the above agreed statement, and the rule discharged.

Thereupon the United States on the relation of McBride sued out this writ, and assigns for error that the court below erred in refusing to issue a *mandamus* in conformity to the prayer of the petition.

Mr. Walter H. Smith and *Mr. James H. Mandeville* for the relator.

1. The court below had jurisdiction. *Kendall* v. *United States*, 12 Pet. 524. The whole question was fully and elaborately argued in that case, and the doctrine announced, that, by reason of the adoption of the laws of Maryland for the government of this part of the District, the Circuit Court, under the act of Feb. 27, 1801, which established it and defined its jurisdiction, could, as incident to its common-law powers, issue the writ to an executive officer of the United States, it at that time having general jurisdiction in cases at common law, and being the highest court of original jurisdiction in the District. That decision has been followed in all the subsequent cases. The Circuit Court has, it is true, been superseded by the court

below; but the latter has the same powers, and the statutory provisions which were regarded as controlling in *Kendall* v. *United States* are still in force, and are as applicable to it as they were to the Circuit Court.

2. We admit that the Secretary of the Interior, in carrying into effect his supervisory and appellate power over the branches of the public service committed to his department is not subject to judicial control in matters involving the exercise of his judgment and discretion. When the demand in question was made there was no longer any scope for the exercise of either. He had but a plain ministerial duty to perform after the title had been transferred to McBride by the due execution and recording of the patent. Being a title by record, the delivery of the patent was not necessary to vest the land in individual proprietorship. *Phillip's Lessee* v. *Irwin*, 1 Tenn. 235; *Green* v. *Liter*, 8 Cranch, 247; *Cunningham* v. *Browning*, 1 Bland, 304; *Steele* v. *Lowry*, 4 Ohio, 72; *Enfield* v. *Pennit*, 8 N. H. 515; *Lapeyre* v. *United States*, 17 Wall. 191; *LeRoy* v. *Clayton*, 2 Sawyer, 496; *LeRoy* v. *Jamison*, 3 id. 391; *Marbury* v. *Madison*, 1 Cranch, 137; *Lavergnes' Heirs* v. *Elkin*, 17 La. 227; *Mitchell* v. *Ryan*, 3 Ohio St. 387; *Donner* v. *Palmer*, 31 Cal. 510; *Chipley* v. *Farris*, 45 id. 539; *Miller* v. *Ellis*, 57 id. 73; *People* v. *Livingston*, 8 Barb. (N. Y.) 255; *Smalley* v. *McLain*, 14 Ga. 254; *Willis* v. *Jermin*, Cro. Eliz. 167; *Ex parte Beck*, 1 Bro. C. C. 578; *Ex parte Koop*, 6 Ves. 599; *Leighton's Case*, 2 Vern. 173; *O'Reilly's Case*, 1 Ves. Jr. 112; *Ex parte Kurtman*, 3 Rich. (S. C.) Ch. 257; 3 Op. Atty.-Gen. 654; Bacon's Abr., tit. Pre. F.; 2 Bl. Com. 344; 3 Wash. Real Prop. 520.

The lands covered by the patent having ceased to be a part of the public domain, the Secretary's jurisdiction to determine any conflicting claim to them absolutely ceased. He might as well have tried an action of ejectment for a parcel of ground in this city, or passed a decree to quiet the title thereto.

3. It has been urged that a patent is sometimes improvidently executed and recorded under a mistake of fact, or from error in law, and that public mischief and individual hardship will ensue if the Secretary has no authority to recall it before its delivery, and cause it to be cancelled and the record of it to be expunged.

To this we answer, *First*, that the destruction of a deed, after it has worked a transfer of title, does not reinvest the estate in the grantor. *Secondly*, that the assumption of a power not conferred by law finds no justification in the fact that a mischief may be thereby suppressed, or a private right maintained, even conceding that the power may in some hands be wisely exercised to secure what is believed to be a lawful end. If in the administration of the land system further powers should be vested in the Secretary of the Interior, Congress alone can confer them. *Thirdly*, that it is the exclusive province of the courts to avoid, in a direct proceeding, a patent which has been granted on a false suggestion, or by mistake. *Bruner* v. *Manlove*, 1 Scam. 161; *Mowry* v. *Whitney*, 14 Wall. 434; *Doll* v. *Meader*, 16 Cal. 295; *Leese* v. *Clark*, 18 id. 572; *People* v. *Stratton*, 25 id. 242; *Brady* v. *Begum*, 26 Barb. (N. Y.) 529; *State* v. *Bachelder*, 5 Minn. 223; *Arnold* v. *Grimes*, 2 Iowa, 85; *Patterson* v. *Winn*, 9 Pet. 663; *Williams* v. *Carpenter*, 33 Mo. 52.

4. In this case the Secretary, by withholding the patent and the exemplification of it, wrongfully deprives the relator of the indispensable evidence of his title, and the latter, having no other adequate remedy, is entitled to a *mandamus*. *Marbury* v. *Madison*, 1 Cranch, 137.

5. The Secretary is the proper party defendant. Rev. Stat., sects. 441, 453.

The Attorney-General, contra.

1. The court below has no jurisdiction to issue a *mandamus* to an executive officer of the United States. The statute which in *Kendall* v. *The United States* (12 Pet. 524), and in subsequent cases, was construed as vesting the Circuit Court or the Supreme Court of the District with such jurisdiction has been repealed.

By the Revised Statutes relating to the District of Columbia certain sections are substituted for that statute. They, if differing in language or effect from it, must prevail in all cases thereafter arising. *Bowen* v. *United States*, 100 U. S. 508.

Sect. 61 gave power to the legislative assembly to modify the practice and enlarge the jurisdiction of the courts of the

District whenever necessary to the due execution and enforcement of the laws of the District.

Sect. 89 continued in force the organization of the judicial courts.

Sect. 91 continued in force the local municipal laws.

Sect. 92, which is first in importance in this connection, continued in force the laws of the State of Maryland *not inconsistent with this title*, as the same existed on the 27th of February, 1801, except as since modified or repealed by Congress or by authority thereof, or until so modified or repealed.

Sect. 93 declares that the Constitution and all laws of the United States not locally inapplicable shall have the same force and effect within the District as elsewhere within the United States.

These are the existing provisions. They undoubtedly include the former laws of Maryland which, as local law, are necessary to the proper administration of justice in the District. The Maryland laws governing local matters, individual rights, and personal transactions are preserved for all the ends of municipal and local government. Whatever goes beyond this and relates to officers of the United States as such, whose duties are supposed to be the same whether in or out of the District, trenches upon the domain of Federal law, and must be considered as not local in its character. Such general laws must be applied with the same force and effect in the District of Columbia as elsewhere. Sect. 93. If no local reason exists for enlarging their scope, they have no exclusive application to the District.

The Revised Statutes vest the courts of the District with the *same* jurisdiction as that possessed and exercised by the Circuit and the District Courts of the United States. Sect. 763, as amended by the act of Feb. 27, 1877 (19 Stat. 253), grants the local jurisdiction necessary to the enforcement of the laws previously cited. Such jurisdiction was not included in that conferred upon the courts of the District as circuit and district courts. This jurisdiction is limited by sect. 767–769, with respect to original pleas; subordinate and inferior causes being confided to justices of the peace, under chapter 31 of the Revised Statutes relating to the District of Columbia.

Now, while it is true that the statutes and the common law which prevailed in Maryland in 1801 were, by act of Congress, continued in force in this District, yet *Kendall* v. *United States* (*supra*) declares that the power of the Circuit Court to exercise the jurisdiction now in question resulted from the analogy which that court, as the highest judicial tribunal within the District, bore to the highest Maryland court, and that its power to issue a *mandamus* to an executive officer was conferred by the third section of the act of Feb. 27, 1801, giving it the same jurisdiction as the circuit courts of the United States then possessed under the act of Feb. 13, 1801. The subsequent repeal of the latter act, it was held, did not change within the District the jurisdiction previously vested. As that third section is repealed, the grant of "the same jurisdiction as the circuit courts of the United States" which is made to the Supreme Court of the District by the act of revision, June 22, 1874, must be measured and determined by the law as it stood at the latter date. *McClung* v. *Silliman* (6 Wheat. 598) and *McIntire* v. *Wood* (7 Cranch, 504) expressly decide that since the repeal of the act of Feb. 13, 1801 (2 Stat. 89), by that of April 29, 1802 (2 Stat. 156), no such jurisdiction as that now claimed is vested in the circuit courts of the United States. It cannot, therefore, be exercised by the court below.

2. It is conceded by the counsel for the relator that such jurisdiction, if it exists, does not extend to the acts of the Secretary which involve the exercise of his judgment and discretion. The issue of a patent for public lands of the United States is such an act, and to render the instrument effectual delivery is essential.

This conclusion may be drawn from the language of the law. Sect. 453, Rev. Stat., requires the Commissioner of the General Land-Office to perform, under the direction of the Secretary of the Interior, "all executive duties" which relate to "the issuing of patents for all grants of land under the authority of the government." Sect. 458 prescribes the requisites as to their form, signature, and record. Sect. 459 provides for a special officer to complete the issue, "in pursuance of instructions from the commissioner," by certifying, affixing the seal, engrossing, recording, and transmitting such patents. These are the pre-

scribed "executive duties" which relate to the issuing of the patent as previously assigned. Each statutory proceeding is essential to the operation of the whole.

In *McGarrahan* v. *Mining Company* (96 U. S. 316), it is said that "the patent executed in the prescribed form which issues from the General Land-Office is made the instrument of passing title out of the United States." Here it is obvious that the execution in the prescribed form is referred to as being quite distinct from, and independent of, the issue from the General Land-Office. Execution is not issue, nor does the patent issue by the record; for it is immediately said by the court that "the record called for by the act of Congress is made by copying the patent to be issued into the book kept for that purpose. The effect of the record, therefore, is to show that an instrument such as is there copied has actually been prepared for issue from the General Land-Office." The issue from the office must, in pursuance of this doctrine, mean something beyond and subsequent to the recording, and the next statutory duty named in sect. 459 is the "transmission" of such patent. Here is the final executive duty connected with the instrument itself, and by it delivery to the patentee must be intended. It will not do to say that this does not mean delivery, without suggesting any other possible definition. The established regulations of the General Land-Office require this duty of the recorder, and rules are published governing the transmission of patents to the patentees through the intervention of the District land-officers as agents of the government, or directly from the General Land-Office, the possession of the instrument never being given up except upon surrender of the duplicate receipt, or proof, by affidavit, of its loss. For authority to establish such regulations, see *Snyder* v. *Sickles*, 98 U. S. 203; Rev. Stat. 2478.

Here, then, is an official executive act necessary to the complete issue of the patent, and essential to its operation to pass the title of the United States. The delivery, personally, by the recorder is said to be a better recognition of its validity than the record itself. *McGarrahan* v. *Mining Company*, *supra*. And again, in speaking of the effect of an imperfect instrument perfectly recorded, or a perfect instrument imper-

fectly recorded, to prove a grant, the court says, "If a perfect patent has in fact issued, it must be proved in some other way than by the record." p. 323.

The issue, which, it has been shown, is subsequent to the record, and can only mean delivery, is treated as the thing to be proved; all the matters of record are but instruments of evidence to establish the *fact of issue*. And so the court says: "When a right to a patent is complete, and the last formalities of the law in respect to its execution and issue have been complied with by the officers of the government charged with that duty, the record will be treated as presumptive evidence of *its delivery to and acceptance by the grantee*." And in the final clause it is said that the record will be treated as a perfect record of an imperfect instrument, "until overcome by proof that the instrument as executed and *delivered* was valid." The only reasonable inference from these repeated allusions to the delivery and possession of the patent is that *delivery* is deemed by this court to be essential to the complete issue of the patent and the conveyance of the legal title.

And to the same effect is *Moore* v. *Robbins*, 96 U. S. 530 It is there said: "When the patent has been awarded to one of the contestants, and has been issued, *delivered*, and accepted, all right to control the title, or to decide on the right to the title, has passed from the land-office." p. 532. Again: "If . . . the patent . . . is *delivered to* and accepted by the party the *title* of the government passes with this *delivery*. With the title passes away all authority or control of the executive department over the land, and over the title which it has conveyed." p. 533. This moment of *delivery* and acceptance is the instant when authority and control over the title cease, and the issue is complete in law. Up to that moment executive authority and discretion continue, and the official functions, with which the courts cannot interfere, remain unimpaired in the officer having original power in the matter. The court says: "The functions of that department necessarily cease when the title has passed from the government. And the title does so pass when, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the President, and sealed and *delivered* to and accepted by the grantee." p. 533.

This has been declared to be the effect of executive acts, done within the scope of legal authority. Attention was specially directed to the action of the department in land cases. The inquiry of the court, on p. 534, was, "If such a power exists, when does it cease?" The answer, three times asserted, fixes as the precise period of time the *delivery and acceptance of the patent.* The patentee, taking by matter of record the grant of the government, may rely on such record, after the complete issue and delivery of his patent, for proof that it was so delivered and accepted. The record is undoubtedly pre sumptive evidence of the delivery, as it is also of the validity of the grant; but it does not operate to complete title without such delivery. In 2 Bl. Com. 348, it is said that the king's grant, if he grants an estate contrary to law, or if his own title to the thing granted be different from what he supposes, is absolutely void. Washburn on Real Property (vol. iii. p. 520) says that the patent, "when regularly and properly issued, becomes a complete evidence of title."

It thus appears that delivery is essential to the issue of a patent. Up to that time, its regularity can be determined only by the Interior Department. The courts have not yet acquired jurisdiction. In *Bell* v. *Hearne* (19 How. 252) and *Maguire* v. *Tyler* (1 Black, 195, and 8 Wall. 664), patents had been prepared and delivered. The court held that, as there was no acceptance, the delivery was not good, and the recall and cancellation of them were proper, leaving the status of the land precisely as it had been before the instruments were recorded. In the first case, the patent had reached the true grantee, John Bell, but, by error in the certificate of entry, it had been executed in favor of James Bell, and by assignment the land had passed to other parties as his property. But the court sustained the recall of the surrendered patent against the claim of James Bell, who alleged that he was the grantee *of record*, and it gave as a reason, that the patent had never been delivered to *him.*

These cases cannot be explained except upon the theory that the delivery was essential; that a refusal to accept the patent prevented such delivery, and upon its return to the Commissioner of the General Land-Office he had power to cancel it and

the record thereof, and deal with the lands according to their status before its execution. For, if the record proved title, the latter had passed without delivery, and to restore it a reconveyance would have been required. But the court says that the status of the land was the same after the recall as before the preparation of the patent. Never having been effectually delivered, its possession by the commissioner gave him jurisdiction for good cause to cancel it. *Doswell* v. *De la Lanza*, 20 How. 29; *Phillips* v. *Shaw*, 36 Ala. 189.

McBride can take nothing by the mere execution and recording of his patent *without* delivery. If a mistake in the condition of the title, or a want of authority to issue it, be discovered before completing its issue by delivery, no title or right depending on such execution passed to him, and the department may treat it as void, and proceed to dispose of the land according to law. The cases cited fully sustain this position. Title by matter of record, as shown by the authorities cited by his counsel, differs from feoffment only in not requiring livery of seisin to vest the title. It does not dispense with delivery of the instrument. This is true in most cases of deed by private individuals or municipal bodies in the American States, but the deed takes effect only from delivery. *County of Calhoun* v. *American Emigrant Company*, 93 U. S. 124.

3. Constructive delivery may and does exist where the grantor, in the exercise of his proper authority, places the deed in the hands of a stranger for the use of the grantee, or even in some cases where he retains possession, at the same time sufficiently manifesting his intention to treat it as having passed the title to the grantee. This doctrine cannot, however, prevail in this proceeding. The petition admits and the record shows that the instrument has never passed from the custody of the government, and McBride sues to compel its original delivery. He cannot now assert that there has already been a constructive delivery.

The latter cannot be presumed, for the further reason, that at the date of the demand the fact had become known to the proper officer that he had mistaken the true condition of the title, and was forbidden by law to issue the patent as the act and deed of the government.

The direction to a subordinate official to deliver it was to take effect only upon the express acceptance of McBride, accompanied by his surrender of the outstanding duplicate, or proof of its loss. This direction might be revoked upon discovery of sufficient reasons to defeat the efficacy of the patent, just as final delivery might have been refused by the commissioner had it remained in his personal custody. Before its preparation, and afterwards, the authorities of Grantsville claimed the land under the town-site law of 1867. 14 Stat. 541. There was a contest pending and undetermined before the land-office, between them and McBride, involving their respective rights. The patent was prepared, therefore, by some accident or mistake, in violation of law and the rules of the department. It necessarily follows that the power to adjudge whether it ought to issue had not been exercised by the Commissioner of the General Land-Office in the first instance, or by the Secretary on appeal. They were, therefore, not precluded from further examining and deciding the case according to the rules and regulations of the department. Nor could they deprive either contestant of the right to a full hearing by the delivery of an improvidently prepared patent to the other.

Lands within town-site limits are excluded from the operation of the homestead law. Hence, in 1869, McBride's entry was illegal, and a patent, if issued to him thereon for the land, would be equally so. "No title can be held valid which has been acquired against law. . . . The patent of defendant having been for lands reserved for such appropriation is void." *Stoddard* v. *Chambers*, 2 How. 284; *Ross* v. *Doe ex dem. Barland*, 1 Pet. 655; *Lindsey* v. *Miller's Lessee*, 6 id. 666; *Brown* v. *Clements*, 3 How. 650; 5 Op. Att.-Gen. 9. *Newhall* v. *Sanger* (93 U. S. 761) holds in effect that the patents to the railroad company, not having been issued in "compliance with the requirements of the acts of Congress, commonly known as the Pacific Railroad Acts," were invalid and passed no title. So, in *Leavenworth, Lawrence, & Galveston Railroad Co.* v. *United States* (id. 733), the certified lists of selected lands, furnished by the Commissioner of the General Land-Office to the Governor of Kansas, which, by statute (10 Stat. 346), have the force and effect of a patent, were pronounced void, as the lands were not subject to

selection under the grant to that State for railroad purposes. To the same effect are *Reichart* v. *Felps*, 6 Wall. 160; *Shepley et al.* v. *Cowan et al.*, 91 U. S. 330; *Wirth* v. *Branson*, 98 id. 118.

The case is this: By some inadvertence, a patent, which if delivered would pass no title, was prepared, signed, sealed, and recorded. The fact was discovered before the instrument had passed from the possession of the Interior Department, and before a decision as to McBride's right was made. It was withheld pending the final disposition of the contest involving the title to the land, and the decision has been rendered against him. As its delivery would be illegal, it is respectfully submitted that the Secretary cannot be compelled to do an act which is either unlawful or beyond his rightful jurisdiction and authority.

MR. JUSTICE MILLER, after stating the case, delivered the opinion of the court.

Some question was made, on the argument in this court, as to the effect of the answer as evidence, and the practice in the Court of King's Bench, in England, has been referred to as making the return to the writ conclusive, or at least evidence, of all it states. We are relieved of any difficulty on this point by the stipulation of the parties.

No writ of *mandamus*, alternative or otherwise, was issued. There was, therefore, no technical return, and in strictness the rule applicable to such a writ does not apply. If, however, it could be held that the answer to the rule to show cause stands in the place of a return to a writ of *mandamus*, the parties have voluntarily made their own issues, and stipulated as to the evidence which shall be considered by the court.

By this stipulation the allegations of the original petition, except one which is specified, are to be taken as true. Certain other facts are then set out. It is then added that all other matters stand upon the original and supplemental petitions, the answer, and replication, and that there was no other or further proof offered by either party. As the replication distinctly put in issue every paragraph of the answer, as no evidence was offered in support of the answer, and as the rule of the court is

recited which makes the replication in this case a denial of the substance of the pleading to which it relates, we must exclude the supplemental petition and the answer of the respondent as evidence, and decide the case on the allegations of the original petition and the facts stipulated in the agreed case.

We are met at the threshold of this inquiry by a denial of the authority of the Supreme Court of the District of Columbia to issue a writ of *mandamus*, as an original process.

The argument is, that the jurisdiction of that court over this class of subjects is governed by sect. 760 of the Revised Statutes relating to the District of Columbia. That section enacts that "the Supreme Court shall possess the same power and exercise the same jurisdiction as the circuit courts of the United States." As this court decided in *McIntire* v. *Wood* (7 Cranch, 504) and *McClung* v. *Silliman* (6 Wheat. 598) that the circuit courts of the United States possessed no such power, the argument would be perfect if no other powers on that subject existed in the Supreme Court of the District than what is conferred by the above section.

This court, in *Kendall* v. *United States* (12 Pet. 524), had under consideration the act of Feb. 27, 1801, organizing originally the courts of this District. It was held that the clause of the act declaring the laws of Maryland to be in force at that date in the part of the District ceded by her invested the Circuit Court, as it was then called, with this very power, because it was a common-law jurisdiction, and the common law on that subject was then in force in Maryland. This proposition has been repeatedly upheld by the court since that time, and up to the date of the revision it was no longer an open question that in a proper case the court had authority to issue the writ.

It is now said, however, that this section being enacted as of the first day of December, 1873, defines the jurisdiction of the Supreme Court of the District as governed by the powers of the circuit courts of the United States over the same subject at that date, at which time it is clear these latter courts had no such power; and that, as the revision repealed all other laws on the same subject, the act concerning the law of Maryland no longer applied to the case.

This leaves out of the process of reasoning the ninety-second section of the revision, which declares again that "the laws of the State of Maryland, not inconsistent with this title, as the same existed on the twenty-seventh day of July, 1801, except as since modified or repealed by Congress or by authority thereof, or until so modified or repealed, continue in force within the District." Thus the argument is precisely the same as it was in *Kendall* v. *United States*, for it was urged there, as here, that as the act creating the court measured its jurisdiction by that of the circuit courts of the United States, which had no such jurisdiction, there could be none in the former; to which the court replied, the provision which continued in force the laws of Maryland.

The revision has merely separated the different sections of the act of Feb. 27, 1801, and placed part of it in sect. 760 and part of it in sect. 92. Neither provision is repealed, and we think that both of them are retained, with the construction placed on them by this court in *Kendall* v. *United States* and the subsequent cases. But this question would seem to be set at rest by the act of 1877, "to perfect the revision of the Statutes of the United States, and of the statutes relating to the District of Columbia." The act amends sect. 763 of the Revised Statutes relating to the District of Columbia, by enacting that "said courts shall have cognizance of all crimes and offences committed within said District, and of all cases in law and equity between parties, both or either of which shall be resident or be found within said District, and also of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants." 19 Stat. 253.

We are of opinion that the authority to issue writs of *mandamus* in cases in which the parties are by the common law entitled to them is vested in the Supreme Court of the District of Columbia.

We proceed to inquire whether the relator has made such a case.

If the relator was entitled to the possession of the patent as his property, and it was the plain duty of the Secretary to deliver it to him when demanded, then, under all the author-

ities, and especially the decisions of this court, he is entitled to the remedy he asks. From the case of *Marbury* v. *Madison* (1 Cranch, 137), down to the present time, such has been the settled doctrine of this court. And though it may be said that the opinion of Mr. Chief Justice Marshall in that case was not necessary to the decision made, which was that *this* court had no *original* jurisdiction in that case, the principles of the opinion have since been repeatedly recognized and acted upon in this court, and the case cited with approval in its definition of the circumstances under which persons holding public offices will be compelled to perform certain duties which are merely ministerial. *Kendall* v. *United States*, 12 Pet. 524; *Decatur* v. *Paulding*, 14 id. 497; *Kendall* v. *Stokes et al.*, 3 How. 87; *Commissioner of Patents* v. *Whiteley*, 4 Wall. 522.

The next objection to issuing the writ which we are called to consider is that the Secretary, in deciding whether he would deliver the patent to McBride or not, was called upon to exercise a judgment and discretion on the case presented to him which were not merely ministerial, but which were rather judicial in their character, and in regard to which many matters were to be considered, — such as the validity of the title conferred by the patent, the circumstances under which it was signed, sealed, and recorded, and the conflicting rights of other parties to the lands covered by it. In short, that this execution of the patent concluded nothing, and the authority of the Secretary and the Commissioner of the General Land-Office to deal with the whole subject, including the relator's right to the lands, remained unaffected by the patent. Whether this be so or not must depend upon the authority conferred by Congress upon those officers, and the effect of the patent in the stage which it had reached when the demand for its possession was made by McBride.

The Constitution of the United States declares that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States. Under this provision the sale of the public lands was placed by statute under the control of the Secretary of the Interior. To aid him in the performance of this duty, a bureau was created, at the head of which

is the Commissioner of the General Land-Office, with many subordinates. To them, as a special tribunal, Congress confided the execution of the laws which regulate the surveying, the selling, and the general care of these lands.

Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the government conveyed to the citizen. This court has with a strong hand upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.

But we have also held that when, by the action of these officers and of the President of the United States, in issuing a patent to a citizen, the title to the lands has passed from the government, the question as to the real ownership of them is open in the proper courts to all the considerations appropriate to the case. And this is so, whether the suit is by the United States to set aside the patent and recover back the title so conveyed, as in *United States* v. *Stone* (2 Wall. 525), or by an individual to cause the title conveyed by the patent to be held in trust for him by the patentee on account of equitable circumstances which entitle the complainant to such relief. *Johnson* v. *Towsley*, 13 id. 72, and other cases.

In the case before us it is said that the instrument called a patent, which purports in the name of the United States to convey to McBride the lands in controversy, is not effectual for that purpose for want of delivery. That though signed, sealed, countersigned, and recorded, and then sent to the register of the land-office at Salt Lake City for delivery to him, it never was so delivered, and has always remained under the control of the officers of the Land Department, and that the instrument is invalid as a deed of conveyance for want of delivery to the grantee. If it were conceded that delivery of the patent is essential to the transfer of title to the grantee, and that such delivery is required as is necessary in a conveyance from man to man, it would be a question of some difficulty to decide whether such delivery took place in this case. The well-known principle by which the intention of the grantor in

a deed to make an act which falls far short of manual delivery, to stand for delivery, when so designed, might well be applied to the act of the commissioner in transmitting the patent by mail to the local office for the purpose of delivery; while, on the other hand, it is argued with much force that the instrument never actually passed from the land-office or the control of its officers. We do not think the decision of this point necessary to the case before us.

We are of opinion that when, upon the decision of the proper office that the citizen has become entitled to a patent for a portion of the public lands, such a patent made out in that office is signed by the President, sealed with the seal of the General Land-Office, countersigned by the recorder of the land-office, and duly recorded in the record-book kept for that purpose, it becomes a solemn public act of the government of the United States, and needs no further delivery or other authentication to make it perfect and valid. In such case the title to the land conveyed passes by matter of record to the grantee, and the delivery which is required when a deed is made by a private individual is not necessary to give effect to the granting clause of the instrument.

The authorities on this subject are numerous and uniform. They have their origin in the decisions of the English courts upon the grants of the crown evidenced by instruments called there, as here, patents.

Blackstone describes four modes of alienation or transfer of title to real estate, which he calls common assurance: the first of which is by matter *in pais* or deed; the second by matter of record, or an assurance transacted only in the king's public courts of record; the third by special custom; and the fourth by devise in a last will or testament.

In the chapter devoted to alienation by deed he enumerates among the requisites to its validity the act of delivery. Book 2, c. 20. But in chapter 21, devoted to alienation by matter of record, nothing is said about delivery as necessary to pass the title, and under this head he includes the king's grants. These, he says, are all made matter of public record, and are contained in charters or letters-patent. He then recites the processes by which patents are prepared and perfected, the

various officers through whose hands they pass, and the manner of affixing the seal to them, and their final enrolment. They are then perfect grants, and no mention is made of delivery as a prerequisite to their validity. After this they can only be revoked or annulled by *scire facias* or other judicial proceeding. The importance attached to the delivery of the deed in modern conveyancing arises largely from the fact that the deed has taken the place of the ancient livery of seisin in feudal times, when, in order to give effect to the enfeoffment of the new tenant, the act of delivering possession in a public and notorious manner was the essential evidence of the investiture of the title to the land. This became gradually diminished in importance until the manual delivery of a piece of the turf, and many other symbolical acts, became sufficient. When all this passed away, and the creation and transfer of estates in land by a written instrument, called the act or deed of the party, became the usual mode, the instrument was at first delivered on the land in lieu of livery of seisin. Shepherd's Touchstone, 54; Co. Litt. 266 *b*; Washburn, Real Property, book 3, 308. Finally, any delivery of the deed, or any act which the party intended to stand for such delivery, became effectual to pass the title. *Church* v. *Gilman*, 15 Wend. (N. Y.) 656; *Butler* v. *Baker*, 3 Co. 25 *b*; *Warren* v. *Swelt*, 31 N. H. 332; *Hatch* v. *Hatch*, 9 Mass. 307.

But in regard to the transfer of title by matter of record, whether this record were a judgment or decree in a court of justice, as fines and recoveries, or the record made in the proper office (generally in the Court of Chancery by the Lord Chancellor) of the king's grant, called enrolment, no livery of seisin was necessary, nor any delivery of the document sealed with the king's seal; for when this seal was affixed to the instrument and the enrolment of it was made, no higher evidence could be had, nor was any other evidence necessary of this act or deed of the king. Hence, Mr. Cruise, in his Digest of the English Law of Real Property, says: "The king's letters-patent need no delivery; nor his patents under the great seal of the Duchy of Lancaster; for they are sufficiently authenticated and completed by the annexing of the respective seals to them." Title xxxiv. sect. 1, par. 3.

In *Marbury* v. *Madison*, to which we have already referred, the court, likening the commission of the justice of the peace, which was signed and sealed by the President and left in the hands of the Secretary of State, to a patent for lands, uses this language: "By the act passed in 1796, authorizing the sale of lands above the mouth of the Kentucky River (vol. iii. p. 229), the purchaser, on paying his purchase-money, becomes completely entitled to the property purchased, and on producing to the Secretary of State the receipt of the Treasurer, upon a certificate required by the law, the President of the United States is authorized to grant him a patent. It is further enacted that all patents shall be countersigned by the Secretary of State and recorded in his office. If the Secretary of State *should choose to withhold this patent*, or the patent being lost should refuse a copy of it, can it be imagined that the law furnishes to the injured party no remedy? *It is not believed that any person whatever would attempt to maintain such a proposition.*"

In another part of the opinion it is said: "In all cases of letters-patent, certain solemnities are required by law, which solemnities are the evidences of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions, the sign-manual of the President and the seal of the United States are those solemnities."

The same principle is found in the opinion of the court, delivered by Mr. Justice Story, in *Green* v. *Liter*, 8 Cranch, 229.

Many decisions of State courts of the highest character to the same effect are cited in the brief of counsel for the relator in this case, among which may be mentioned *Ex parte Kuhtman*, 3 Rich. (S. C.) Ch. 257; *Donner* v. *Palmer*, 31 Cal. 500. The subject is very fully and ably discussed by Mr. Justice Field in the case of *Leroy* v. *Jamison*, 3 Sawyer, 369.

It is also said that there was no acceptance of this patent by the grantee, and for that reason it is ineffectual to convey title. It is not necessary to enter into much discussion on this subject, because the acceptance of a deed may be presumed under circumstances far short of what was admitted to exist in this case.

The doctrine on this point is well stated by Attorney-General

Crittenden, in the case of Pierre Mutelle, in 1841, as found in 3 Op. Att.-Gen. 654, which was a case like the present, in regard to the duty of the Secretary to deliver the patent then lying in the office.

"My opinion," said he, "is that the title to the land *did pass to Pierre Mutelle at the date of the patent to him, though that patent still remains in the land-office without any actual tradition of it to any one.* The patent was issued by authority and direction of law, and upon general principles, *where the patentee does not expressly dissent,* his assent and acceptance are to be presumed from the beneficial nature of the grant. But it is hardly necessary to resort to such presumptions, because, in this and in all such cases, the acts required to be done by the claimant, and actually done by him in the preparation of his claim for patenting, are equivalent to a positive demand of the patent and amount to an acceptance of it. The patent, in the meaning of the act referred to, *is granted to the patentee from its date, though he may never actually see or receive it,* and is valid and effectual to pass the title to the land.

"All legal muniments of title belong to him who owns the land, . . . but as the patent is a recorded evidence of title, always accessible, no material prejudice can result to the true owner from a stranger getting possession of it."

The long pursuit of this claim by McBride, his repeated demand for the patent after it had been perfected, and his persistent effort to obtain possession of it, are ample proof of his acceptance of the grant of which it is the evidence.

It is argued with much plausibility that the relator was not entitled to the land by the laws of the United States, because it was not subject to homestead entry, and that the patent is, therefore, void, and the law will not require the Secretary to do a vain thing by delivering it, which may at the same time embarrass the rights of others in regard to the same land.

We are not prepared to say that if the patent is absolutely void, so that no right could possibly accrue to the plaintiff under it, the suggestion would not be a sound one.

But the distinction between a void and a voidable instrument, though sometimes a very nice one, is still a well-recognized dis-

tinction on which valuable rights often depend. And the case before us is one to which we think it is clearly applicable. To the officers of the Land Department, among whom we include the Secretary of the Interior, is confided, as we have already said, the administration of the laws concerning the sale of the public domain. The land in the present case had been surveyed, and, under their control, the land in that District generally had been opened to pre-emption, homestead entry, and sale. The question whether any particular tract, belonging to the government, was open to sale, pre-emption, or homestead right, is in every instance a question of law as applied to the facts for the determination of those officers. Their decision of such question and of conflicting claims to the same land by different parties is judicial in its character.

It is clear that the right and the duty of deciding all such questions belong to those officers, and the statutes have provided for original and appellate hearings in that department before the successive officers of higher grade up to the Secretary. They have, therefore, jurisdiction of such cases, and provision is made for the correction of errors in the exercise of that jurisdiction. When their decision of such a question is finally made and recorded in the shape of the patent, how can it be said that the instrument is absolutely void for such errors as these? If a patent should issue for land in the State of Massachusetts, where the government never had any, it would be absolutely void. If it should issue for land once owned by the government, but long before sold and conveyed by patent to another who held possession, it might be held void in a court of law on the production of the senior patent. But such is not the case before us. Here the question is whether this land had been withdrawn from the control of the Land Department by certain acts of other persons, which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. It was a question for the land-officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously, the patent may be voidable, but not absolutely void.

The mode of avoiding it, if voidable, is not by arbitrarily

withholding it, but by judicial proceedings to set it aside, or correct it if only partly wrong. It was within the province of those officers to sell the land, and to decide to whom and for what price it should be sold; and when, in accordance with their decision, it was sold, the money paid for it, and the grant carried into effect by a duly executed patent, that instrument carried with it the title of the United States to the land.

From the very nature of the functions performed by these officers, and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings their authority in the matter ceases.

It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever this takes place, the land has ceased to be the land of the government; or, to speak in technical language, the legal title has passed from the government, and the power of these officers to deal with it has also passed away. The fact that the evidence of this transfer of title remains in the possession of the land-officers cannot restore the title to the United States or defeat that of the grantee, any more than the burning up of a man's title-deeds destroys his title.

What is this final act which closes the transaction?

In *Marbury* v. *Madison* (*supra*), this court was of opinion that when the commission of an officer was signed by the President and the seal of the United States affixed to it, the commission was complete, and the officer entitled to its possession could enforce its delivery by the writ of *mandamus*. In regard to patents for land, it may be somewhat different, and it is not necessary in this case to go quite so far.

But we may well consider that in all nations, as far as we know, where grants of the property of the government or of the crown are made by written instruments, provision is made for a record of these instruments in some public government office. Our experience in regard to Mexican, Spanish, and French grants of parts of the public domain purchased by us from those governments teaches us that such is the uniform law

of those countries. We have already shown that under the English law all letters-patent are enrolled, and that this is the last act in the process of issuing a patent which is essential to its validity.

We are safe in saying that every State of the Union has similar provisions in reference to its grants of land, and it has been the effort of most of them to compel public record of all conveyances of land by individuals or corporations.

The acts of Congress provide for the record of all patents for land in an office, and in books kept for that purpose. An officer, called the Recorder, is appointed to make and to keep these records. He is required to record every patent before it is issued, and to countersign the instrument to be delivered to the grantee. This, then, is the final record of the transaction, — the legally prescribed act which completes what Blackstone calls "title by record;" and when this is done, the grantee is invested with that title.

We do not say that there may not be rare cases where all this has been done, and yet the officer in possession of the patent be not compellable to deliver it to the grantee. If, for instance, the secretary whom the President is authorized by law to appoint to sign his name to the patent should do so when he has been forbidden by the President, or if, by some mere clerical mistake, the intention of the officer performing an essential part in the execution of the patent has been frustrated. It is not necessary to decide on all the hypothetical cases that could be imagined.

But we are of opinion that when all that we have mentioned has been consciously and purposely done by each officer engaged in it, and where these officers have been acting in a matter within the scope of their duties, the legal title to the land passes to the grantee, and with it the right to the possession of the patent.

No further authority to consider the patentee's case remains in the land-office. No right to consider whether he ought in equity, or on new information, to have the title or receive the patent. There remains the duty, simply ministerial, to deliver the patent to the owner, — a duty which, within all the definitions, can be enforced by the writ of *mandamus*.

It is not always that the ill consequences of a principle should control a court in deciding what the established law on a particular subject is, and in the delicate matter of controlling the action of a high officer of the executive branch of the government, it would certainly not alone be sufficient to justify judicial interposition. But it may tend to reconcile us to such action as we feel forced to take, under settled doctrines of the courts, to see that any other course would lead to irremediable injustice.

If the relator in this case cannot obtain his patent, he is wholly without remedy. He cannot sue the United States, in whom is the title in the absence of the patent; for the United States can be sued in no other court than the Court of Claims, and we have decided that that court has no jurisdiction in such a case. *Bonner* v. *United States*, 9 Wall. 156. There is no one else to sue, for the title is either in the relator or the United States. It may be many years before the city of Grantsville, the party now claiming against him, will get a patent, and it may never do so.

The relator is, therefore, utterly without remedy, if the land be rightfully his, until he can obtain possession of this evidence of his title.

On the other hand, when he obtains this possession, if there be any equitable reason why, as against the government, he should not have it, — if it has been issued without authority of law, or by mistake of facts, or by fraud of the grantee, — the United States can, by a bill in chancery, have a decree annulling the patent, or possibly a writ of *scire facias*. If another party (as the city of Grantsville) is, for any of the reasons cognizable in a court of equity, entitled, as against the relator, to have the title which the patent conveys to him, a court of chancery can give similar relief to the city as soon as the patent comes into his possession, or perhaps before. So that it is plain that by non-action of the Land Department the legal rights of the parties may remain indefinitely undecided, and those of the relator seriously embarrassed or totally defeated, while the delivery of the patent, under the writ of *mandamus*, opens to all the parties the portals of the courts where their rights can be judicially determined.

We are of opinion that the relator in the case, as presented to us, is entitled to the possession of the patent which he demanded, and that the writ of *mandamus* by the Supreme Court of the District of Columbia is the appropriate remedy to enforce that right. The judgment of that court will be reversed, and the case remanded with instructions to issue the writ; and it is

So ordered

MR. CHIEF JUSTICE WAITE, with whom concurred MR. JUSTICE SWAYNE, dissenting.

I am unable to agree to this judgment. There are very few, if any, of the general principles of law so well stated in the opinion of the court, to which I do not give my assent. My objection is to the application which is made of them to the facts of this case.

In the stipulation of the parties, it is "conceded that *the case* relating to said premises, set out in the answer of the respondent, had been appealed from the decision of the Commissioner of the General Land-Office to the Secretary of the Interior, and was pending before the said Secretary at the time the demand for the patent was made on him, as set forth in the original petition of relator, and for some days thereafter, and that at the time of such demand, and for some days thereafter, the said patent was, with the papers in said case, as an exhibit in said case, in the office of the Secretary of the Interior, and was not in the General Land-Office." This is, as I think, an admission that the case set out in the answer was pending, and permits us to look into the answer and ascertain what that case was. The facts on which the case rests may not be admitted, but the existence of the case as set out is.

Looking, then, to the answer, we find that case to have been as follows: On the 24th of February, 1877, the corporate authorities of the city of Grantsville made an application for the cancellation of the entry of McBride on the lands in controversy. This application was forwarded to the Commissioner of the General Land-Office for final adjudication and decision under the law and the established rules and practice of the department, and it came to a final decision by the Commissioner of the General Land-Office Feb. 7, 1879. On the 8th

of April, 1879, McBride appealed to the Secretary of the Interior. In his appeal he claimed, 1st, that the decision of the commissioner was contrary to the preponderance of the evidence as shown in the record of the case, and, 2d, that the decision is contrary to the law of the case.

In the original petition for this *mandamus* it is stated that the patent was dated Sept. 26, 1877. It thus appears distinctly that when the patent was signed, sealed, and recorded there was a contest authorized by law pending in the department between McBride and the corporate authorities of Grantsville as to who had the better right, under the laws of Congress, to the land. It is not pretended that any formal decision was made by any of the department officers charged with that duty that the patent should issue. Under these circumstances it may fairly be inferred, irrespective of the positive averments to that effect in the answer, that the patent was improvidently issued through the neglect of some of the clerks having charge of the business details of the office. In my opinion, it was the imperative duty of the Commissioner of the Land-Office, when these facts were brought to his attention, to direct that the delivery of the patent be withheld.

I agree that, when the right to a patent has become complete, the execution and delivery of the patent itself are the mere ministerial acts of the officers charged with that duty; and I further agree that when the right to a patent has been determined, and the patent has actually been signed, sealed, countersigned, and recorded, no actual delivery is necessary to pass the title. When the last formalities of the law prescribed for the due execution of a patent have been complied with, the grant is complete, if it has before that time been determined in some appropriate way that the right to the patent exists. Ordinarily, the due execution of the patent will be evidence of such a determination. But certainly, as between the United States and the patentee, such evidence will not be conclusive. Different questions may arise if the rights of third persons intervene; but, as between the original parties, until the patent *ought* to issue, it may, in my opinion, be recalled at any time before it gets out of the actual possession of the United States. In reality, it can convey only what the officers of the United

States have the lawful right to grant; and, if it can convey nothing, the Secretary of the Interior ought not to be required by *mandamus* to do a vain thing.

The contest here was as to the right of McBride to his homestead entry. Confessedly, the land is within the incorporated city of Grantsville, and his entry was not made at the land-office until after the town was incorporated, although he settled on the land long before. It was a question, therefore, whether, under the circumstances, he had the right to his entry. That question was pending before the department in the ordinary course of proceedings when the patent was executed. It involved the investigation of facts. This is apparent, both from the case, as set forth in the petition, and the appeal papers which McBride himself filed. That the facts were disputed, too, is apparent from the statement in the appeal that the decision of the commissioner was contrary to the *preponderance* of the evidence. The patent ought not to have been executed if the entry was unlawful. Whether it was lawful or not was, at the time, the question at issue between McBride and the authorities of Grantsville in the contest then pending in the department. The law makes provision for such contests; and we have over and over again held that, in the absence of fraud, the decision of the officers on the facts is final. *Johnson* v. *Towsley*, 13 Wall. 72. As the right of McBride to a patent depended on the result of that contest, will the execution of the patent have the effect of a judgment on the facts before the hearing is concluded?

I will not pursue the subject further. Enough has already been said to show the grounds of my dissent. In my opinion, to direct the Secretary to deliver the patent is to give McBride execution in his pending suit before judgment rendered, and may lead to inextricable confusion.

NOTE. — A motion was subsequently made to modify the order that each party should pay his own costs, and to render judgment against the defendant for costs.

MR. JUSTICE MILLER delivered the opinion of the court.

Our first impression was that as the defendant was sued in regard to the manner in which he had discharged certain official duties as Secretary of the Interior, in which no intentional wrong was charged or proven against him, it

would be unjust to make him pay the costs of the proceeding out of his own pocket.

But a careful examination of the authorities leaves us no option but to follow the rule that the prevailing party shall recover of the unsuccessful one the legal costs which he has expended in obtaining his rights.

In *Kendall* v. *United States* (12 Pet. 524), the leading case establishing the right of a citizen to the use of the writ of *mandamus* to compel a public officer to perform a duty merely ministerial, the relator recovered his costs. The duty in that, as in the present case, was one enjoined upon a cabinet officer, which he refused to perform. It is obvious that he thought he was right in refusing to do the act demanded of him, yet this court, as shown by the report of the case, rendered judgment for costs against him.

In *United States* v. *Boutwell* (17 Wall. 604), which was the case of a writ of *mandamus* against the defendant as Secretary of the Treasury, and which the court held to be abated by his retirement from office, it was said: "It is the personal default of the defendant that warrants the impetration of the writ, and if a peremptory writ of *mandamus* be awarded, the costs must fall upon the defendant." And it is argued that as it would be unjust to make the successor in office of the delinquent secretary pay the cost of defending the action of his predecessor, the writ must of necessity abate.

We cannot, in the face of these cases, refuse the order for costs, however much we might wish it were otherwise. There may be a contingent or other fund of the department out of which they can be paid. If there is none, Congress may provide for it or enact generally that when the officers of the government are sued with reference to the manner in which they have performed or failed to perform their official duties, they, as in revenue seizures and similar cases, shall be relieved from the expense of the suit if they have acted with good motives and upon reasonable grounds.

The relator must have judgment for his costs.

MANUFACTURING COMPANY v. LADD.

1. Where a bill was filed charging an infringement of reissued letters-patent No. 5154, dated Nov. 19, 1872, which was denied by the answer, the court, in view of the state of the art at the date of the invention for which the original letters were granted to Asa M. Swain, May 11, 1860, for improvements in water-wheels, construed the claims of the reissued letters in accordance with the distinct limitation of that invention in the original letters to a wheel of specific construction and form with its associated apparatus, and finding that there was no infringement of the claims thus construed dismissed the bill. *Held*, that such a construction gave the complainant no just ground of exception.
2. The evidence examined, and the result of a comparison of the reissued letters with the original letters, including the drawings and model submitted with the application for them, stated.
3. A reissue can only be granted for the same invention which was originally patented.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

The facts are stated in the opinion of the court.

Mr. John S. Abbott and *Mr. Henry W. Boardman* for the appellant.

Mr. Charles E. Mitchell for the appellee.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The Swain Turbine and Manufacturing Company filed a bill against James E. Ladd, alleging that the latter had infringed certain letters-patent owned by the company, which had been granted to Asa M. Swain on the 15th of May, 1860, for a new and improved water-wheel, and which had been surrendered and reissued on the 19th of November, 1872, numbered 5154. The bill sought an account of profits, damages for the infringement, and a perpetual injunction against further use of the alleged invention. The defendant filed an answer denying infringement, and assailing the patent of the complainant on various grounds, such as prior discovery and invention by other persons, illegality of the new issue, &c. Proofs having been taken and the cause heard, the Circuit Court dismissed the bill, on the ground that, according to the true construction of the patent sued on, the defendant did not infringe. The company thereupon appealed.

It was conceded that if the reissued patent should be construed literally, without restraining the generality of its claims by a reference to the original patent, the wheels made by the defendant would be an infringement; but the court, in view of the state of the art at the date of Swain's invention, and of the distinct limitation of that invention in the original patent to a wheel of specific construction and form, considered itself bound to construe the claims of the reissued patent in accordance with such limitation, in order to avoid the conclusion that it was for another and different invention from that originally patented. From a careful examination of the evidence in the case we are satisfied that this was the most favorable view that could have been taken for the complainant. A comparison of the original letters-patent, including the drawings and model, with the reissued patent, makes it very evi-

dent that the latter is the result of an effort to enlarge the scope of the patent so as to include and embrace within it matters and things that were not embraced in the original invention. The original specification, drawings, and model all agree in describing a specific wheel and associated apparatus as the subject of the invention secured by the letters-patent. They distinctly describe a wheel with its floats, each made of a single piece of metal, having their face sides, where the water strikes, of a paraboloidal form, with their bottoms formed by revolving the curves on their axes, and arranged in a particular direction to receive the water from the guides; and having the rim of the wheel covering the floats so curved as to force the water down rapidly in the lower curved parts or bottoms of the floats; the water being turned down between the curb and wheel and lower curb: they describe an annular chamber situated above and outside of the wheel, with slots in its bottom to receive and steady the guides when raised with the gate, and which is filled with water, forming a sort of stuffing-box: they describe a cylindrical gate, below the annular chamber surrounding the curb below the wheel, provided at the top with a flange to which the guides are attached, and which is opened by being lowered to let the water into the wheel through the guides, and is shut by being raised up to the bottom of the annular chamber: lastly, they describe a particular contrivance for adjusting the wheel on its step, which is of no consequence in the disposal of the present case. Substantially, this is the entire description: the wheel, formed and made as stated; the annular chamber; the cylindrical gate, with the guides attached to its flange; and the contrivance for adjusting the wheel on the step. There is also a description of the enclosing case and curbs, and the machinery for raising and lowering the gate and the wheel; but these parts have nothing to do with the controversy.

The claim of the patent was threefold: first, for the annular chamber, with slots in the bottom to receive the guides; secondly, the combined arrangement of the guides, the cylindrical gate, and the annular chamber, as unitedly related to the wheel; thirdly, the step arrangement. Here we have a clear and distinct specification of an invention, and of the particular machinery which is its subject-matter. The wheel is not

claimed, either as to its form or fashion, or mode of operation; nothing is claimed but the annular chamber, the peculiar gate and guide arrangement, and the step adjustment, — none of which things are in controversy in this suit.

But a change comes over the scene: the patent becomes the property of a corporation that manufactures wheels; a monopoly of the business is very desirable; other manufacturers make turbine wheels approaching somewhat in appearance to that described in Swain's patent. The usual remedy in such cases is resorted to. A reissue of the patent is sought, with expanded claims, sufficiently general and comprehensive to embrace a wide monopoly of structure, and to shut up competing establishments. In this way the patent laws have been made the instruments of great injustice and oppression. The real object and design of a reissue of a patent have been abused and subverted. The intent of the law was to allow a correction to be made "whenever a patent is inoperative, or invalid, by reason of a defective or insufficient description or specification, or by reason of the patentee's claiming in his specification as his own invention more than he has a right to claim as new; and when the error has arisen by inadvertency, accident, or mistake, and without any fraudulent or deceptive intention." These are the words of the law granting the right. It was never intended to allow a patent to be enlarged; but to allow the correction of mistakes inadvertently committed, and the restriction of claims which had been improperly made, or which had been made too broad, — just the contrary of that which has come to be the practice. In a clear case of mistake — not error in judgment — the patent may undoubtedly be enlarged; but that should be the exception, not the rule; whereas the enlargement of claims has become the rule, and their contraction the exception.

These remarks are well illustrated in the case before us. We have shown what was the original invention described and claimed. After the lapse of twelve years and a half the patentee (or rather his corporation assignee) discovers that through inadvertence and mistake his specification is wrong, and needs correction; and a reissue is obtained, with eleven different claims. These claims are quite different from those

of the original patent, and are intended to give to the present proprietors a large and valuable monopoly. Here are some of the claims: —

1. A water-wheel, the floats of which have a discharge-line extending from the crown at their inner edge to the lower outer edge of the wheel.

2. The combination in a water-wheel of a crown, band, and floats, having their discharge-line extending from the crown at their inner edge to their lower outer edge.

3. The combination in a water-wheel of a crown and floats, having their discharge-line extending from the crown at their inner edge to the lower outer edge.

5. A water-wheel having an effective inward flow and discharge of part of the water, and an effective downward flow and discharge of part of the water simultaneously in one wheel, whereby the effective area of discharge is increased without increasing the diameter of the wheel.

Here is a sweeping generalization, which, taken literally, would give to the patentee a monopoly of all water-wheels having simultaneously an effective inward and downward flow and discharge, whatever might be the shape of the floats, or of the crown. This was certainly not the invention described or suggested in the original patent. The invention of a wheel was not claimed at all: a wheel was described; but it was a wheel made after a particular pattern or form, and adjusted to a particular apparatus for the reception and discharge of the water. Its buckets were described as paraboloidal; its rim over the buckets curved downward and inward so as to force the water down rapidly in the lower curved parts or bottoms of the floats. No intimation is given that a wheel of a different form would answer the purposes of the invention. The defendant does not copy either of these features in his wheels. Their floats are not paraboloidal, but waving; the rim is not curved downward and inward, but is horizontal. It is very apparent why the claim has been generalized as it has been. The patentee desires to secure the monopoly of every centre-vent wheel, of whatever shape or form, which discharges the water both inwardly in the centre of the wheel and downwardly from the bottoms of the floats beneath the wheel. But that would be a

new invention, very different from what was described and claimed in the original patent. To warrant this extension of the claim, the specification of the reissued patent contains material variations from that of the original, frequently stating that a particular part *may* be constructed thus and so, when the original *required* it to be thus and so; it speaks of "the upper horizontal edge of the floats," when no such thing is mentioned in the original, but on the contrary the rim over the floats was described as curving inward and downward, and as being so curved for a special purpose and effect. Instead of correcting inadvertent mistakes in the specification, which rendered the patent inoperative and void, the pretended corrections are evidently intended to widen the scope of the patent, and to make it embrace more than it did at first. So far as description went, the original specification was as perfect as the new one.

The mistake of the patentee (or his assigns) seems to have been in supposing that he was entitled to have inserted in a reissued patent all that he might have applied for and had inserted in his original patent. The appellant produced on the argument exhibits tending to show that the patentee before obtaining his original patent had made and done all those things which are embraced in or covered by the reissued patent. If this were true, it would be nothing to the purpose. A reissue can only be granted for the same invention which was originally patented. If it were otherwise, a door would be opened to the admission of the greatest frauds. Claims and pretensions shown to be unfounded at the time might, after the lapse of a few years, a change of officers in the Patent Office, the death of witnesses, and the dispersion of documents, be set up anew, and a reversal of the first decision obtained without an appeal, and without any knowledge of the previous investigations on the subject. New light breaking in upon the patentee as the progress of improvement goes on, and as other inventors enter the field, and his monopoly becomes less and less necessary to the public, might easily generate in his mind an idea that his invention was really more broad and comprehensive than had been set forth in the specification of his patent. It is easy to see how such new light would naturally

be reflected, in a reissue of the patent, and how unjust it might be to third parties who had kept pace with the march of improvement. Hence there is no safe or just rule but that which confines a reissued patent to the same invention which was described or indicated in the original.

Since, therefore, any extension of the reissued patent beyond the scope of the invention set forth and fairly indicated in the original specification, drawings, and model, would be fatal to the patent itself, we think that the appellant ought to be satisfied with the course taken by the circuit judge in so construing the patent with reference to those original tests as to restrain and confine the intent and meaning of the claims within legitimate and admissible bounds. And so construed, there is no plausible pretence that the defendant is guilty of an infringement.

If the appellant insists on the broad construction of the claims in the new patent, it must take the risk of being met with previous achievements in the same line of improvement, which may very seriously endanger the validity of its patent. Several structures have been produced on the hearing, antedating the invention of Swain, and it would be very difficult to maintain that they do not embrace the principal feature in Swain's wheel, sought to be appropriated by him.

If the evidence with regard to Stowe's wheels, constructed in 1837, 1841, and 1850, is to be relied on, it is not a sufficient answer to say that they were merely spout-wheels, and were never used under water as turbines. They are substantially the same wheel as Swain's, and whether used as turbines, or only under the operation of a spout, they anticipate his structure. The mere change of use by placing them in a different position with regard to the water is not patentable.

The Temple wheel, the Whitney wheel, and the Greenleaf wheel all conduct the water in the same lines that Swain's does from its entrance into the wheel to its final departure from it; and if, on an investigation of dates, we should find that either of these wheels antedated Swain's invention, we should probably be forced to the conclusion that they each contained the fundamental element of a simultaneous inward and downward flow and discharge of water through the wheel,

which the appellant claims as the principle of Swain's invention.

We do not deem it necessary to go into a more particular examination of the evidence at this time. We have examined it carefully, and have come to the conclusion that the view taken of the case by the Circuit Court was as favorable to the appellant as it could reasonably ask.

Decree affirmed.

DANIELS v. TEARNEY.

1. The convention of the State of Virginia passed, April 13, 1861, an ordinance entitled "An Ordinance to provide against the sacrifice of property and to suspend proceedings in certain cases," whereby, if a debtor, against whom there was an execution in the hands of an officer, offered bond and security for the payment of debt, interest, and costs, when the operation of the ordinance should cease, his property should be restored to him. If he offered no bond, the property was to be restored to him without lien, unless it would bring its appraised value as of the date of Nov. 6, 1860. No executions were, after the date of the ordinance, to be issued against residents except in favor of the State. The convention passed, April 18, 1861, an ordinance of secession. A., against whom an execution was issued March 21 of that year, availed himself of the provisions of the ordinance of April 13, by giving the requisite bond and security. The judgment against him remaining unpaid and the ordinance having ceased to operate, suit was brought on the bond. *Held*, that the obligors are estopped from setting up that, by reason of anything contained in the ordinance, the bond is invalid.
2. *Home Insurance Co.* v. *City Council of Augusta* (93 U. S. 116) and *United States* v. *Hodson* (10 Wall. 395) cited and approved.

ERROR to the Circuit Court of Jefferson County, State of West Virginia.

The facts are stated in the opinion of the court.

Mr. Daniel B. Lucas for the plaintiffs in error.

Mr. Charles J. Faulkner, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is a writ of error, brought to reverse a judgment of the Supreme Court of Appeals of the State of West Virginia.

The case, as disclosed in the record, may be sufficiently stated for the purposes of this opinion, as follows:—

On the 18th of April, 1861, a convention of the State of Virginia passed an ordinance of secession, and on the 30th of that month a law entitled "An Ordinance to provide against the sacrifice of property and to suspend proceedings in certain cases." This ordinance declared that thereafter no execution (except in favor of the Commonwealth and against non-residents) should be issued, and that no sales should be made under deeds of trust or decrees without the consent of the parties interested, until otherwise provided by law; and that where executions were in the hands of the officer, whether levied or not, if the debtors should offer bond and security for the payment of the debt, interest, and costs, when the operation of the ordinance should cease, the property should be restored and the bond should be returned, as in the case of a forthcoming bond, and should be a lien on the realty of the obligors. If the debtor offered no bond, his property was to be appraised by three freeholders, at its value on the 6th of November, 1860, and unless the property would sell for the amount of the valuation, it should be restored to the debtor without lien.

The suit was brought in the Circuit Court of Jefferson County, State of West Virginia, by Tearney and Wilson, executors of Colin C. Porter. The declaration sets forth that the defendants, on the first day of June, 1861, made their joint and several bond, whereby they bound themselves to pay to the plaintiff the sum of $1,597.18 when thereunto requested; and that there was a condition affixed to the bond, which was, "that whereas, on the twenty-fifth day of March, 1861, a writ of *fieri facias* was issued from the clerk's office in the name of Colin C. Porter against Benjamin F. Daniels, for $747.92, with interest from the second day of January, 1860, until paid, and $31.97 costs; if, therefore, the said B. F. Daniels should pay the debt, interest, and costs, when the operation of the ordinance before mentioned should cease, then the obligation to be void, otherwise to be in full force." It was averred that the operation of the ordinance had long since ceased, and yet that the defendants, though often requested so to do, had not paid the said sums of money or any part thereof, whereby an action had accrued, &c.

Among other pleas, the defendants filed one *in hæc verba:*—

"For further plea to this action, the defendants say, that the

bond in the declaration mentioned was executed by Benjamin F. Daniels, a citizen of the State of Illinois, as principal, and by William B. Daniels and D. M. Daniels, as his securities, in pursuance of the requirements and conditions of a statute passed in violation of the Constitution of the United States, heretofore, to wit, on the 30th of April, 1861, by the convention of the State of Virginia, and that said statute was subsidiary to and in aid of and in furtherance of the objects and policy of the ordinance of secession passed theretofore by said convention, to wit, on the —— day of April, 1861, in violation of the Constitution of the United States.

"And the defendants say, that they rely on the fact that said statute and ordinance were in violation of and repugnant to the Constitution of the United States for their defence and plea in this case; and that they are unconstitutional the defendants are ready to verify."

The plaintiff demurred. The court sustained the demurrer, and the defendants excepted. The parties thereupon waived a jury and submitted the case to the court, and a judgment was entered in favor of the plaintiff.

The defendants removed the case to the Supreme Court of Appeals for review. That court affirmed the judgment, and this writ of error was thereupon sued out.

The objection raised as to the jurisdiction of this court is untenable.

In *Home Insurance Co.* v. *City Council of Augusta* (93 U. S. 116), we said: "Where a judgment or decree is brought to this court by a writ of error to a State court for review, the case, to warrant the exercise of jurisdiction on our part, must come within one of three categories: —

"1. There must have been drawn in question the validity of a treaty or statute of, or authority exercised under, the United States; and the decision must have been against the claim which either was relied upon to maintain.

"2. Or there must have been drawn in question a statute of, or authority exercised under, a State, upon the ground of repugnance to the Constitution, or a law or treaty, of the United States; and the decision must have been in favor of the validity of the State law or authority in question.

"3. Or a right must have been claimed under the Constitution, or a treaty, or law of, or by virtue of a commission held or authority exercised under, the United States; and the decision must have been against the right so claimed. Rev. Stat. 132, sect. 709; *Sevier* v. *Haskell*, 14 Wall. 15; *Weston* v. *City Council of Charleston*, 2 Pet. 449; *McGuire* v. *The Commonwealth*, 3 Wall. 385."

The plea is neither full nor technical, but it does aver the invalidity of the statute under which the bond was taken, because it was in violation of the Constitution of the United States, and was passed "in aid and furtherance of the objects and policy of the ordinance of secession," and that the defendants "rely on the fact that said statute and ordinance were in violation of, and repugnant to, the Constitution of the United States, for their defence and plea in this case." This implies clearly that the defendants claimed, in addition to what was averred, that the bond was void in every aspect, and that they had a right, by reason of the premises, to exemption from liability under it. What is thus averred in a pleading is as effectual as if it were expressed. *Haight* v. *Holley*, 3 Wend. (N. Y.) 258.

It thus appears that there was drawn in question the authority of the sheriff, exercised under a law of the State, in taking the bond, and that the decision was in favor of the validity of that authority; and that there was also a right of exemption from liability, claimed under the Constitution of the United States, and that the decision was against the right so claimed. These claims give us jurisdiction. Whether they are well founded remains to be considered. Jurisdiction is only "the right to hear and determine." The result of its exercise is the judgment of the court.

That the ordinance of secession was void is a proposition we need not discuss. The affirmative has been settled by the arbitrament of arms and the repeated adjudications of this court. *Texas* v. *White*, 7 Wall. 700; *Hickman* v. *Jones*, 9 id. 197; *Dewing* v. *Perdicaries*, 96 U. S. 193. It was supplemented and complemented by the statute authorizing the bond to be taken. The latter was one of a series of acts passed by the secession convention, all looking to the conflict of arms which was foreseen to be approaching. They were intended to prepare the State for the struggle, and were means to that end.

The saving in the statute as to executions in favor of the Commonwealth and against non-residents was characteristic. It obviously contemplated the confiscation of the property of the latter as a war measure. We cannot doubt that the statute was invalid by reason of the treasonable motive and purpose by which its authors were animated in passing it. The provision that no executions should issue, and that no sales should be made under decrees or deeds of trust without the consent of the parties interested, "until otherwise provided by law," was clearly in conflict with the contract clause of the national Constitution. *Bronson* v. *Kinzie*, 1 How. 311; *McCracken* v. *Hayward*, 2 id. 608; *Edwards* v. *Kearzey*, 96 U. S. 595.

The circumstances which surrounded the convention and controlled its action are a part of the history of the times, and we are bound to take judicial notice of them. *Brown* v. *Piper*, 91 U. S. 37.

We have already pointed out the infirmities of the statute. One of them is expressly embodied in the bond. The condition is that the obligors shall pay when the statute under which it was taken "*ceases*." That is, that payment was to be made at the time of its cessation, and not before. In the mean time, the statute was to operate as a stay law, and the condition of the bond was framed accordingly. This, as we have shown, was directly repugnant to the constitutional provision which forbids the impairment of contracts by State laws. The bond, as a statutory instrument, cannot have more validity than the statute which prescribed it as the means of giving effect to the statute in the way it was intended to operate. To hold the bond valid as a statutory bond, and the statute void, would be an inversion of reason. Viewed in this light, it is void for exactly the same reasons that the statute is void. They rest on the same basis, and must stand or fall together. The creditor was not to be consulted. His assent was not required. So far as he was concerned, the sheriff could proceed *in invitum*. The option to give the bond or not was with the debtor. The presence or absence of the creditor, and his assent or dissent, were alike immaterial. He was powerless in any event to control the result.

The cases are numerous in which it has been held that

where a bond contains conditions, some of which are legal and some illegal, and they are severable and separable, the former may be enforced and the latter disregarded. *United States* v. *Hodson*, 10 Wall. 395. But this bond does not belong to that class. The condition is a unit, and indivisible. There are no separate elements into which it can be resolved. It must be considered as an entirety, and can be viewed in no other light. As a statutory bond, therefore, the instrument is clearly void. Whether it is void also as a voluntary bond is a point upon which the opinions of all the members of the court are not entirely in accord. We pass from the subject without further remark, because, irrespective of that question, there is a view decisive of the case, in regard to which we are unanimous and our minds are free from doubt.

Conceding the bond to have been wholly void in both aspects, it does not by any means follow that it could not thereafter, under any circumstances, be enforced as between the parties, or that there is such error in the judgment that it must necessarily be reversed.

A corporation is liable for negligent and malicious torts, including libel, assault and battery, malicious prosecution, and false imprisonment. In such cases the plea of *ultra vires* is unavailing. The corporation is estopped from setting up such a defence. *National Bank* v. *Graham*, 100 U. S. 699.

The same result is produced in like manner in many instances where a corporation, having enjoyed the fruits of a contract fairly made, denies, when called to account, the existence of the corporate power to make it. *Railway Company* v. *McCarthy*, 96 U. S. 258.

The principle of estoppel thus applied has its foundation in a wise and salutary policy. It is a means of repose. It promotes fair dealing. It cannot be made an instrument of wrong or oppression, and it often gives triumph to right and justice, where nothing else known to our jurisprudence can, by its operation, secure those ends. Like the Statute of Limitations, it is a conservator, and without it society could not well go on.

If parties are *in pari delicto*, the law will help neither, but leaves them as it finds them. But if two persons are in *delicto*, but one less so than the other, the former may in many cases

maintain an action for his benefit against the latter. *White* v. *Franklin Bank*, 22 Pick. (Mass.) 181.

It is not necessary here to consider the extent and limitations of the rule. They are fully examined in the authority referred to. In the case in hand the obligee must be deemed wholly innocent, because the contrary is not alleged, and it does not appear. *Quod non apparet, non est. De non apparentibus et non existentibus, eadem est ratio.* "If the contract be executed, however, that is, if the wrong be already done, the illegality of the consideration does not confer on the party guilty of the wrong the right to renounce the contract; for the general rule is, that no man can take advantage of his own wrong, and the innocent party, therefore, is alone entitled to such a privilege." 1 Story, Contr., sect. 610; *Taylor* v. *Weld*, 5 Mass. 108.

It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defence, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect. *Ferguson* v. *Landram*, 5 Bush (Ky.), 230. See *Ferguson* v. *Landram*, 1 id. 548; *Van Hook* v. *Whitlock*, 26 Wend. (N. Y.) 43; *Lee* v. *Tillotson*, 24 id. 337; *The People* v. *Murray*, 5 Hill (N. Y.), 468; *City of Burlington* v. *Gilbert*, 31 Iowa, 356; *B. C. R. & M. R. R. Co.* v. *Stewart*, 39 id. 267.

In the case first cited, an injunction was applied for to prevent the collection of a tax authorized by an act of the legislature passed during the late civil war, to enable the people of a county to raise volunteers and thus avoid a draft for soldiers, and that object had been accomplished. In disposing of the case the court well asked, "Upon what principle of exalted equity shall a man be permitted to receive a valuable consideration through a statute, procured by his own consent or subsequently sanctioned by him, or from which he derived an interest and consideration, and then keep the consideration. and repudiate the statute?"

In *United States* v. *Hodson* (*supra*) this court said: "When a bond is voluntarily entered into and the principal enjoys the benefits it was intended to secure, and a breach occurs, it is then too late to raise the question of its validity. The parties are *estopped* from availing themselves of such a defence."

Not to apply the principle of estoppel to the bond in this case would, it seems to us, involve a mockery in judicial administration and a violation of the plainest principles of reason and justice.

Judgment affirmed.

NOTE. — Another case between the same parties was argued at the same time as was the preceding case. MR. JUSTICE SWAYNE remarked, that there were no material points of difference between them, and that the opinion in the first case was decisive of the second.

Judgment affirmed.

UNITED STATES *v.* KNOX.

1. Where, in order to discharge the liabilities of an insolvent national banking association, the comptroller of the currency assessed against the several shareholders a sufficient percentage upon the par value of the stock by them respectively held, he has no power to direct a further assessment to supply the deficit caused by the inability of the receiver to enforce payment from such as are insolvent or beyond the jurisdiction.
2. "In addition to the amount invested in the shares," the holders thereof, after the exhaustion of the assets of the association, are, to a sum not exceeding the par value of the shares, "individually responsible, equally and ratably and not one for another," for its outstanding debts. The liability is several, and is not affected by the failure of any other shareholder to pay the amount assessed against him.

ERROR to the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. Thomas J. Durant and *Mr. Charles W. Hornor* for the plaintiff in error.

Mr. Charles Case, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This case is a petition for a writ of *mandamus* directed to the comptroller of the currency. It was fully heard in the

court below upon the merits. The writ was refused, and judgment for costs rendered against the relator, the Citizens' National Bank of Louisiana. This writ of error was thereupon sued out, and the case is thus brought before us for review.

There is no controversy as to the facts. The only question presented for our consideration is a question of law. The case made in the record, so far as it is necessary to be stated for the purposes of this opinion, is as follows: On the 7th of April, 1874, the Crescent City National Bank of New Orleans was, and for some time had been, insolvent and in the hands of a receiver. On that day the comptroller assessed each shareholder seventy per cent upon the par value of each share of his stock, and ordered the receiver to collect the assessment. This the receiver proceeded to do by filing a bill in equity in the Circuit Court of the United States for the District of Louisiana, against all the shareholders. Thereafter he obtained a decree against all the defendants severally, who were within the jurisdiction of the court, for the amount due from each one according to the assessment, and the cause was thereupon continued to await any further assessment the comptroller might deem it proper to make, and it is still pending.

The capital stock of the bank was $500,000; seventy per cent, therefore, was $350,000.

This sum, if it could have been collected in full, would have paid all the debts of the bank and left a balance over. But by reason of the insolvency of many of the shareholders the assessment netted only $112,658.13, and nothing, or very little more, will hereafter be realized from it. From the proceeds of the assessment and other assets of the bank, eighty per cent of the principal of its debts have been paid.

The relator being a large creditor of the bank, requested the comptroller to order a further assessment of thirty per cent upon each share of the capital stock, for the discharge of the balance of principal and interest still due to its creditors, and to direct the receiver to proceed as before to collect the amount of the new assessment. The comptroller refused, because the enforcement of such an assessment would compel the solvent shareholders to pay the sums and proportions due from the shareholders who are insolvent.

He holds that no such liability is imposed on the solvent shareholders, and that he has, therefore, no right or power to make the assessment as requested.

The point to be decided is whether he is clothed with this power and duty, and whether the shareholders are thus liable.

The first bank law was passed Feb. 25, 1863, c. 58, 12 Stat. 665. The last clause of sect. 12 is as follows: —

"For all debts contracted by such association for circulation, deposits, or otherwise, each shareholder shall be liable to the amount of the par value of the shares held by him, in addition to the amount invested in such shares."

This provision was changed in 1864, and has been since and is now in force in these terms: "The shareholders of every national banking association shall be held individually responsible, *equally and ratably, and not one for another*, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." Rev. Stat., sect. 5151.

The act of 1863 made no provision for enforcing the personal liability of shareholders, while that of 1864 provided that it might be done through a receiver appointed by the comptroller, and acting under his direction. Id., sect. 5234.

The difference between the clause creating the individual liability as it was originally, and as it was after it was amended and altered, is obvious and striking. The change was plainly made *ex industria*, to prevent the possibility of doubt as to the meaning of Congress. What the effect of the clause would have been without the change is a point we are not called upon to consider. The charter of a private corporation is a contract between the law-making power and the corporators, and the rights and obligations of the latter are to be measured accordingly.

By the common law the individual property of the stockholders was not liable for the debts of the corporation under any circumstances. Here the liability exists by virtue of the statute and the assent of the corporators to its provisions, given by the contract which they entered into with Congress in accepting the charter. With respect to the character of that

liability, it is entirely clear from the language employed in creating it, that it is several and cannot be made joint, and that the shareholders were not intended to be put in the relation of guarantors or sureties, "one for another," as to the amount which each might be required to pay.

In the process to be pursued to fix the amount of the separate liability of each of the shareholders, it is necessary to ascertain, 1, the whole amount of the par value of all the stock held by *all the shareholders;* 2, the amount of the deficit to be paid after exhausting all the assets of the bank; 3, then to apply the rule that each shareholder shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank at its par value. There is a limitation of this liability. It cannot in the aggregate exceed the entire amount of the par value of all the stock.

The insolvency of one stockholder, or his being beyond the jurisdiction of the court, does not in any wise affect the liability of another; and if the bank itself, in such case, holds any of its stock, it is regarded in all respects as if such stock were in the hands of a natural person, and the extent of the several liability of the other stockholders is computed accordingly. *Crease* v. *Babcock*, 10 Metc. (Mass.) 525.

These rules have been applied in several well-considered judgments of other courts, where the words we have italicized were not in the statutes upon which they proceeded. We have found no case in conflict with them. See *Crease* v. *Babcock*, *supra;* *Atwood* v. *R. I. Agricultural Bank*, 1 R. I. 376; *In the Matter of the Hollister Bank*, 27 N. Y. 393; *Adkins* v. *Thornton*, 19 Ga. 325; *Robinson* v. *Lane*, id. 337; *Wiswell* v. *Starr*, 48 Me. 401. See also Morse on Banking, 503.

Although assessments made by the comptroller, under the circumstances of the first assessment in this case, and all other assessments, successive or otherwise, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders, yet if he were to attempt to enforce one made, clearly and palpably, contrary to the views we have expressed, it cannot be doubted that a court of equity, if its aid were invoked, would promptly restrain him by injunction.

Nothing in this opinion is intended in any wise to affect the authority of *Kennedy* v. *Gibson and Others*, 8 Wall. 498, and *Casey* v. *Galli*, 94 U. S. 673. On the contrary, we approve and reaffirm the rule laid down in those cases.

The comptroller decided correctly as to his duty in this case.

Judgment affirmed.

McELRATH v. UNITED STATES.

1. An officer of the army or the navy was, June 20, 1866, subject to summary dismissal from the service by order of the President.
2. On the twenty-seventh day of June, 1866, the President nominated to the Senate A. to be a first lieutenant in the Marine Corps from the twentieth day of that month, *vice* B. dismissed. The Senate advised and consented to the appointment agreeably to the nomination, and A. was commissioned July 13, 1866. *Held*, that such appointment, followed by a commission, operated to discharge B. from the service as effectually as if he had been dismissed by the direct order of the President.
3. So much of sect. 5 of the act of July 13, 1866 (14 Stat. 92), as provides that "no officer in the military or naval service shall, in time of peace, be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof," did not take effect before Aug. 20, 1866, on which day, in contemplation of law, the rebellion against the national authority was suppressed, and peace restored.
4. Upon the settlement of his accounts by the accounting officers of the treasury, B., while announcing that he would not be concluded thereby, and protesting that the allowance was insufficient, received it, and brought suit in the Court of Claims to recover the balance claimed. *Held*, that the United States is not bound by the settlement, but for any moneys improperly paid him in pursuance thereof is entitled to judgment.
5. The provision of the act of March 3, 1863 (12 Stat. 765; Rev. Stat., sects. 1059–1061), authorizing that court, without the intervention of a jury, to hear and determine claims against the government, and also any set-off, counter-claim, claim for damages, or other demand on the part of the government against the claimant, does not violate the Seventh Amendment of the Constitution.

APPEAL from the Court of Claims.

On the 5th of June, 1866, Thomas L. McElrath transmitted to the Secretary of the Navy his resignation as a first lieutenant in the Marine Corps. By an official communication from the Navy Department, dated June 19, 1866, and signed by Mr. Welles, as Secretary of the Navy, he was notified that the

department declined to accept his resignation, the Secretary adding, "As you deserted from the 'Monongahela' on the eve of her sailing for the West Indies, you are hereby dismissed from the service from this date." The President, June 27, 1866, nominated to the Senate for appointment Second Lieutenant George B. Haycock of the Marine Corps to be a first lieutenant in that corps, from June 20, 1866, "*vice* Thomas L. McElrath, *dismissed*." To that appointment the Senate gave its advice and consent; and Haycock was accordingly commissioned, July 13, 1866, to be first lieutenant, on the active list, from June 20, 1866. Thus matters stood until May 14, 1873, when McElrath made a formal application to the department for the revocation and annulment of the order of dismissal of June 19, 1866, submitting therewith evidence tending to show that he was not a deserter, as charged in the order of that date. Pending that application, he tendered, July 10, 1873, his resignation as a first lieutenant in the Marine Corps. On the same day, Mr. Robeson, then Secretary of the Navy, notified him, in writing, that "the order of June 19, 1866, dismissing you [him] from the service, is hereby revoked, having been issued under a mistake of facts." The Secretary added: "You are thus restored to the position which you held at the date of that order. The resignation which you now tender is accepted, to take effect this day."

On the eighth day of January, 1874, the claimant was further notified, in writing, by the Secretary of the Navy, as follows: "Your dismissal from the Marine Corps, as a first lieutenant, dated 19th of June, 1866, is revoked, and your resignation as a first lieutenant in that corps, tendered in your letter of the 10th of July, 1873, is accepted from that date."

Why this second notification was given is not explained, and, in the view which the court takes of the case, it is not material to inquire.

In January, 1874, the claimant made application to the Fourth Auditor of the Treasury for the settlement of his account as first lieutenant in the Marine Corps. That officer, upon examination and settlement of the account, certified to the Second Comptroller that the sum due to the claimant was $6,106.53, being the amount of the half-pay and allowances of

a first lieutenant of marines from June 21, 1866, to July 10, 1873, inclusive. The Second Comptroller, having examined the Auditor's settlement, certified its correctness to the Secretary of the Navy, who issued his requisition, properly countersigned, upon the Secretary of the Treasury, requesting a warrant in behalf of the claimant for the amount so ascertained. A warrant was accordingly issued, and that sum was paid to the claimant, who, at the time he received it, declared his belief that the sum was not the entire amount due him, and that he accepted the same under protest, and should hold himself in no manner concluded as to the remaining sum claimed to be due him.

All of the foregoing facts, and the further fact that the number of first lieutenants in the Marine Corps, from June 5, 1866, to July 10, 1873, was thirty, were known to the Fourth Auditor, the Comptroller, and the Secretary of the Navy when they respectively acted upon the claimant's account.

It also appears that, from June 19, 1866, to June 10, 1873, he was engaged in business in New York, earning $30 per week. In other words, he earned in private business, when not performing service in the navy, during the above period, more than $10,000.

The present action is by McElrath to recover from the United States the balance, nearly $7,000, alleged to be due him on account of pay and allowances as a first lieutenant in the Marine Corps of the United States. The government, denying its indebtedness to him in any sum whatever, set up a counter-claim for the sum of $6,106.53, which, it contends, was paid to him by the accounting officers of the Treasury Department without warrant of law. A judgment was rendered in favor of the United States therefor, and he appealed.

He assigns for error that the Court of Claims erred in holding: 1. That the order of June 19, 1866, was the order of the President, and that the latter dismissed him from the Marine Corps from that date. 2. That he was not entitled to pay and allowance from June 21, 1866, to July 10, 1873. 3. That, in a suit brought in the Court of Claims against the United States, the latter can recover on a counter-claim a judgment against a claimant further than is necessary to defeat his claim. 4. That a counter-claim by the United States in the

Court of Claims which seeks an affirmative judgment for more than twenty dollars is not a suit at common law within the meaning of the Seventh Amendment to the Constitution; and that so much of sect. 3 of the act of March 3, 1863 (12 Stat. 765), as purports to confer on said court power to render such judgment, is not in violation of the Constitution; and that no part of the proceedings in this case constituted or belonged to a suit at common law within that amendment. 5. That the United States under the counter-claim could recover of the appellant the sum paid to him by the accounting officers of the treasury as half-pay and allowances for that period; viz., $6,106.53.

Mr. Frank W. Hackett for the appellant.

The attempted dismissal by Secretary Welles, by his letter of June 19, 1866, was illegal and void. Power summarily to dismiss a commissioned officer of the Marine Corps was at that date lodged in the President alone. Art. of War, 2 Stat. 359; *Ex parte Hennen*, 13 Pet. 230; *Gratiot* v. *The United States*, 1 Ct. of Cl. 258. The presumption that an official act of the head of a department is that of the President, appears to be founded upon the theory that, at some previous period, the President gave general directions, in conformity to which a secretary may from time to time transact public business. But this implied general authority must be confined to such ministerial acts as are within the proper sphere of the secretary's duties. On the dismissal of commissioned officers of the army or the navy by the President, the order, to be effectual and valid, if it be not signed by him, should at least purport to be an attestation of his act.

The action of the President and Senate in nominating and confirming Haycock did not indirectly have the effect of dismissing McElrath. A dismissal from an office, the incumbent whereof is removable at the pleasure of the President, may be caused by the appointment of a successor; but, until the latter is commissioned, that action vests no right in him, nor does it work the removal of the incumbent. *Marbury* v. *Madison*, 1 Cranch, 137; *United States* v. *LeBaron*, 19 How. 73. Haycock's commission was not signed till July 13, 1866. But on that day a statute went into effect providing that no

officer of the military or the naval service should in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof. 14 Stat. 92. A Federal statute takes effect from its date. *Matthew* v. *Zane*, 7 Wheat. 164. This statute took effect from the beginning of July 18. *United States* v. *Lapeyre*, 17 Wall. 191; *United States* v. *Norton*, 97 U. S. 164. Congress, under art. 1, sect. 8, of the Constitution, empowering them to "make rules for the government and regulation of the land and naval forces," may restrain the implied power of the President to make summary dismissals.

The claimant is entitled to full pay and allowances from June 19, 1866, to July 10, 1873. He was debarred from active service by a cause which he could not control, and from no fault of his own. Act June 30, 1834, 4 Stat. 713; Rev. Stat., sect. 1612; Digest Decisions Judge-Advocate-General of the Army, pp. 267–268, sects. 14, 18, 19.

So much of sect. 3 of the act of March 3, 1863 (Rev. Stat. 1061), as purports to give the Court of Claims power to render judgment in favor of the United States against a claimant, is in violation of the Seventh Amendment of the Constitution, which provides that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. *Bains* v. *The James and Catherine*, 1 Baldw. 544; *Parsons* v. *Bedford*, 3 Pet. 446; *Willard* v. *Dorr*, 3 Mas. 161. The counter-claim upon which this judgment was rendered was a suit at common law for money had and received. A counter-claim which seeks not merely to defeat the cause of action, but to obtain a distinct and independent judgment against the claimant, is not a mere incident to the original claim. It is a new suit. The original suit in the Court of Claims is not a suit at common law, but the moment the government attempts to obtain an affirmative judgment in any sum whatever against a claimant, the proceeding, so far as that judgment is concerned, becomes a suit at common law.

Unquestionably, as a general principle, Congress has the right to prescribe terms upon which the government consents to be sued. But it cannot authorize the government to sue an individual in a suit at common law, and deny him therein a

trial by jury. Nor can it do this indirectly by attaching to his right to sue the government a condition that he shall surrender a privilege guaranteed to him by the Constitution. He may, by formally giving his assent thereto, waive the right of trial by jury; but it is the duty of Congress to *preserve* the right in all suits at common law. The Court of Claims has no jury, consequently a petitioner cannot be said *sua sponte* to waive his right to one. Nor is it entirely correct to treat the right of bringing suit in the Court of Claims as a favor. *United States* v. *Klein*, 13 Wall. 144.

But conceding that the court had authority to enter judgment upon the counter-claim, the judgment itself was erroneous. The Secretary and the Second Comptroller decided that appellant was legally entitled to receive the sum paid him. The subject-matter being within their jurisdiction, it is presumed that their action was correct in point of law. *Wilkes* v. *Dinsman*, 7 How. 89. If the money was paid upon a mistake, it was a mistake of law, and according to the well-known rule it is not recoverable.

The Second Comptroller of the Treasury is a *quasi* judicial officer. His decisions have the ordinary elements of finality. *McKee* v. *United States*, 12 Ct. Cl. 532; *McKnight* v. *United States*, 13 id. 292. They are authoritative declarations of law binding on his successors, and respected in like manner as the constructions of a statute which have received judicial sanction. He has jurisdiction to determine whether or not an individual is an officer of the naval or the military forces, and as such entitled to pay and allowances.

This court does not know upon what precise grounds the Comptroller based his decision. There may have been facts presented to him which do not appear of record here. Because the appellant brought his petition in the Court of Claims, asking full pay instead of half pay for a specified period, and because certain facts are certified here from the court below, it does not follow that the payment by the Treasurer, after allowance by the Second Comptroller, was based upon these facts, and nothing else. That, though closely connected with the present proceeding, is a distinct transaction, and there may have been proof laid before the Comptroller which the appel-

lant did not make before the court below, or which is not certified up.

How is this court, for instance, to know whether or not Lieutenant McElrath's case as laid before the Comptroller came within the provisions of the act of March 3, 1865? That act (13 Stat. 489) was in force at the date of Secretary Welles's letter. It provided that in case any officer dismissed by order of the President should "make application for a trial, setting forth under oath that he has been wrongfully and unjustly dismissed, the President shall, as soon as the necessities of the public service may permit, convene a court-martial to try such officer. And if such court-martial shall not award dismissal or death as the punishment of such officer, the order of dismissal shall be void. And if the court-martial aforesaid shall not be convened for the trial of such officer within six months from the presentation of his application for trial, the sentence of dismissal shall be void."

Suppose that an officer dismissed under such circumstances had applied for a court-martial. That tribunal is not convened within six months, or, if convened, does not award death or dismissal. The statute makes the order of dismissal absolutely void. The President meanwhile has sent in to the Senate, and that body has confirmed, the nomination of another individual to fill the vacancy. Is the dismissal thus made legal and valid?

It is error to treat the Comptroller as an *agent* of the government to settle accounts rather than as a quasi-judicial officer, competent to decide the question whether or not Lieutenant McElrath was legally an officer of the navy. While his opinion upon the law of the case may be pronounced incorrect by this court, payment of money made by the government in conformity with his opinion is final and conclusive. Nor does the appellant, by bringing suit in the Court of Claims, reopen the settlement at the treasury so as to entitle the government to recover money paid in mistake of law. If this were the case of credits or allowances made in an account, it may be conceived that an action on the account would give opportunity for the defendant to restate his account; but here the government has actually paid over the money and closed the transac-

tion, so far as the question of liability to pay anything at all is concerned; the only thing remaining unsettled being the method of computation.

As there is no statute of limitation running against the United States, there would be constant danger in dealing with the government, for fear that, years after receiving one's law ful dues (as he supposes), one's heirs would be called upon to make restitution; whereas, practically, but little loss can result to the treasury from an adherence to what has proved a sound rule in transactions between individuals.

The Attorney-General for the United States.

McElrath held his office at the pleasure of the President, and such was the tenor of his commission.

The President's power of summarily dismissing an officer of the army or the navy, although frequently exercised from the origin of the government, was never seriously questioned. No attempt was made until 1865 to impose any limitation upon it. Sect. 17 of the act of July 17, 1862 (12 Stat. 596), did not confer the power, but rather recognized and declared its existence, and requested him to exercise it whenever the efficiency of either of those branches of the service would, in his opinion, be thereby promoted.

The letter of the head of the Navy Department of June 19, 1866, to McElrath as effectually severed his connection with the service as if it had declared in express terms that the dismissal was by order of the President. *Wilcox* v. *Jackson*, 13 Pet. 498. If this, however, were an open question, and doubts could be raised on the subject, they would be removed by the President's nominating, June 27, 1866, Haycock, *vice* McElrath dismissed, and his subsequently commissioning the former from June 20, 1866, pursuant to the appointment made by and with the advice and consent of the Senate. The record thus furnishes conclusive proof of McElrath's dismissal by the President.

Congress has power, by express grant, to make rules for the government and regulation of the land and naval forces. Whether by such rules the President's power of removal can, consistently with the Constitution, be restricted, is a question which does not arise in this case. Sect. 12 of the act of March

3, 1865 (13 Stat. 489), does not apply to McElrath, as he did not avail himself of its provisions; nor does sect. 5 of the act of July 13, 1866 (14 id. 92), for when it took effect he was not in the service.

McElrath being out of the navy, his relations to it thereafter were the same as if he had never entered it. The Secretary's pretended restoration of him in 1873 was without effect. He could only be appointed by the President in the mode prescribed by the Constitution and laws.

All the facts bearing upon the case being set forth in the claimant's petition, the issue before the Court of Claims was essentially one of law, involving the effect of the order of dismissal, its attempted revocation, and the lawfulness of the payment made, under the circumstances, by officers of the United States.

The question of the constitutionality of sect. 1061, Rev. Stat., which he discusses, does not, therefore, fairly arise; but, conceding that it does, the section has no relation to matters of defence which might be pleaded in a suit at common law. It authorizes that court to hear and determine any distinct and separate cause of action of the United States against the claimant, at the same time with his claim; and if it be less or equa. to his, to set it off; and if it be greater, to render judgment for the United States. The principle is the same whether the counter-claim be greater or less than the amount to recover which the suit was brought.

The act of Feb. 10, 1855 (10 Stat. 612), first gave the formal consent of the United States to be sued. To the privilege thus conferred Congress subsequently attached the right of the government to plead a set-off, a counter-claim, a claim for damages, whether liquidated or unliquidated, or other demands on its part.

McElrath, by availing himself of the privilege, waived in the Court of Claims whatever right he possessed of trial by jury in other courts.

A set-off is merely an incident to a pending suit, and acts upon a plaintiff already in court. Congress has not attempted to bring debtors into a court where there is no trial by jury. It simply says, that when asserting rights by suit against the United States they shall be subject to its cross-demand.

A set-off did not exist at common law in suits at law. *Green* v. *Darling*, 5 Mas. 201; *Green* v. *Farmer*, 4 Burr. 2214.

In a recent case brought here by appeal from the Court of Claims, where the judgment upon a counter-claim was for hundreds of thousands of dollars, it was not suggested or intimated by eminent counsel that sect. 1061 was unconstitutional. *Union Pacific Railroad Co.* v. *United States*, 99 U. S. 402.

The argument of the claimant strikes at the whole existence of the court, for it was as customary to try by jury issues of fact arising on a petition of right, as those arising in suits brought by the sovereign against the subject. Tidd's Practice, tit. Extent in Chief, p. 1046; Manning's Exchequer Practice, tit. Petition of Right, p. 85.

The receipt by the claimant of public money to which he had no right, legal or equitable, gave to the United States a cause of action.

The allowance of the claim by the accounting officers is no obstacle to a recovery. After jurisdiction to hear set-offs and counter-claims had been conferred on the Court of Claims, Congress provided, by the act of March 30, 1868 (15 Stat. 54, sect. 191, Rev. Stat.), that the balances stated by those officers upon settlements of public accounts should be subject to revision by the proper courts.

Neither the United States nor the claimant is bound by those settlements. *United States* v. *Bank of the Metropolis*, 15 Pet. 377; *United States* v. *Kaufman*, 96 U. S. 567.

Public money paid improperly and without authority of law, by the agents of the government, may be recovered. *Cooke* v. *United States*, 91 U. S. 397; *Bayne* v. *United States*, 93 id. 642; *Attorney-General* v. *Perry*, 2 Com. 481; *United States* v. *Bartlett*, 2 Ware, 9; *Duke de Cadaval* v. *Collins*, 6 Nev. & M. 324; *Jones* v. *Barkley*, 2 Doug. 684, 697; *Muttyloll Seal* v. *Dent*, 8 Moo. P. C. C. 319; Evans's Essay on the Action for Money Had and Received, 28, 29.

MR. JUSTICE HARLAN, after stating the case, delivered the opinion of the court.

The first and second assignments of error proceed upon the ground that, notwithstanding the order of dismissal of June 19,

1866, and the subsequent appointment, by and with the advice and consent of the Senate, of Haycock as a first lieutenant in the Marine Corps, *vice* McElrath, the latter was never legally dismissed from the service, but was, in law, a first lieutenant in that corps during the whole period from June 20, 1866, to July 10, 1873, and as such entitled to full pay and allowances.

In discussing the questions of law involved in this position, counsel for the claimant starts with these propositions: that the order of dismissal issued from the Navy Department under the official signature of Secretary Welles was without authority of law; that the President alone, at that time, was invested with power to summarily dismiss from the service a commissioned officer of the Marine Corps; and that, since the order in question simply purported to be the act of the Secretary, and did not purport to be the act of the President, or to have been issued in pursuance of any previous direction by him given, the presumption cannot be indulged that the dismissal of Lieutenant McElrath was by order of the President.

These propositions open up a very broad field of inquiry as to what exceptions there are to the general rule that the direction of the President is to be presumed in all instructions and orders issuing from the proper department concerning executive business, notwithstanding they may contain no express statement of any direction from him as to the matters to which such instructions or orders refer. There are, undoubtedly, official acts which the Constitution and laws require to be performed by the President personally, and the performance of which may not be delegated to heads of departments, or to other officers in the executive branch of the government. It is equally true that, as to the vast multiplicity of matters involved in the administration of the executive business of the government, it is physically impossible for the President to give them his personal supervision. Of necessity he must, as to such matters, discharge his duty through the instrumentality or by the agency of others. Whether a particular act belongs to one or the other of these classes may sometimes be very difficult to determine, and we shall not attempt now to lay down any general rule upon the subject. Nor shall we extend this opinion by any consideration of the question whether the particular order,

signed by Secretary Welles, should not be presumed to have been issued by direction of the President. The determination of that question is not essential to the disposition of this case, since, if that order should, for the reasons urged by the claimant's counsel, be deemed a nullity, the nomination and confirmation, subsequently, of Lieutenant Haycock, followed by his commission, as a first lieutenant in the Marine Corps in place of Lieutenant McElrath, as certainly operated, under the law as it then was, to remove the latter from the service, as if he had been dismissed by direct order of the President under his own signature. This, because, as is conceded, the President, at the time he asked the advice and consent of the Senate to the appointment of Lieutenant Haycock in place of Lieutenant McElrath, had the power to dismiss the latter, summarily, from the service. That power, if not possessed by the President, in virtue of his constitutional relations to the army and navy (and as to that question we express no opinion), was given by an act of Congress approved July 17, 1862. The seventeenth section of that statute declared "that the President of the United States be, and hereby is, authorized and requested to dismiss and discharge from the military service, either in the army, navy, marine corps, or volunteer force, in the United States, any officer, for any cause which, in his judgment, either renders such officer unsuitable for, or whose dismission would promote, the public service." 12 Stat. 599. The message of the President informing the Senate of the dismissal of Lieutenant McElrath, and the consent of the Senate to the appointment of Lieutenant Haycock, in his stead, followed by a commission, in due form, clearly invested the latter with the office which McElrath had held, and gave him from that time the exclusive right to the pay and allowances attached to that position.

But we are here met with the suggestion that a vacancy did not exist, and Lieutenant Haycock's right to the office did not attach until he received his commission on the thirteenth day of July, 1866, on which day, and from the first moment of that day, — as is claimed upon the authority of *United States* v. *Lapeyre* (17 Wall. 191) and *United States* v. *Norton* (97 U. S. 164), — it was the law that "no officer of the

military or naval service shall, in time of peace, be dismissed from service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof." Act of July 13, 1866, 14 Stat. 92. To this suggestion one obvious answer is, that the act of July 13, 1866, was not, on that day, in effective operation. That act assumes to control the President, in the matter of dismissing officers from the naval and military service, only in *time of peace*. Its purpose was, upon the declaration of peace, to suspend the broad power which he exercised during the recent rebellion, when prompt, vigorous action was often demanded, to dismiss an officer from the service whenever, in his judgment, the public interests would thereby be promoted. But when was the rebellion suppressed and peace inaugurated? Not until the twentieth day of August, 1866, on which day the President announced, by proclamation, that the insurrection against the national author ity was at an end, and that "peace, order, tranquillity, and civil authority" then existed "in and throughout the whole of the United States of America!" 14 Stat. 814; *United States* v. *Anderson*, 9 Wall. 71; *The Protector*, 12 id. 702. The effect of that proclamation, as fixing the time when the rebellion closed, was distinctly recognized by Congress in the act of March 2, 1867 (14 Stat. 422), which declared that the previous act of June 20, 1864 (13 id. 144), increasing the pay of soldiers in the army, should be continued in full force and effect for three years "after the close of the rebellion, as announced by the President of the United States, by proclamation, bearing date Aug. 20, 1866." Since peace, in contemplation of law, could not exist while rebellion against the national government remained unsuppressed, the close of the rebellion and the complete restoration of the national authority, as announced by the President and recognized by Congress, must be accepted as the beginning of the "time of peace," during which the President was deprived of the power of summarily dismissing officers from the military and naval service.

It results that neither when Lieutenant Haycock was nominated to and confirmed by the Senate, nor when he was commissioned in place of McElrath, was the sentence of a court-martial, or any commutation thereof, required as a con-

dition precedent to the exercise by the President of the power of dismissal, or to his appointment of an officer in the service, by and with the advice and consent of the Senate.

It also necessarily follows, from what has been said, that the orders which issued from the Navy Department under the signature of Secretary Robeson, in 1873 and 1874, even if issued by direction of the President, were inoperative for the purpose of reinstating the appellant in his position as a first lieutenant in the Marine Corps. The position to which it was attempted to restore him had, as we have seen, been previously filled by constitutional appointment, and by the laws *then* in force the incumbent could neither be displaced nor dismissed, except "upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof." The attempted restoration was ineffectual for the additional and equally conclusive reason, that the complement of first lieutenants in the Marine Corps was at that time full. The order assuming to restore him was, of course, for the reasons already given, equally inoperative to entitle him to pay and allowances for any portion of the period covered by the account settled by the officers of the treasury. The requisition upon the Secretary of the Treasury by the Secretary of the Navy was, consequently, without warrant of law. During the period for which the appellant was allowed half-pay he was not an officer in the service, and the allowance to him of pay, after the appointment of his successor, was illegal.

We come now to inquire whether the Court of Claims erred in awarding judgment against the appellant for the amount paid to him out of the treasury of the United States upon the settlement of his accounts.

Upon this branch of the case counsel for the claimant contends that so much of the act of March 3, 1863, as invests the Court of Claims with power to render judgment in favor of the United States against a claimant, is in violation of the Seventh Amendment of the national Constitution, which provides that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

That section, referring to the trial of causes in which the

government may plead against the claimant any set-off, counter-claim, claim for damages, or other demand, provides that the court shall hear and determine such claim and demand both for and against the government and claimant; and if, upon the whole case, the court finds that the claimant is indebted to the government, it "shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases provided for by law." There is nothing in these provisions which violates either the letter or spirit of the Seventh Amendment. Suits against the government in the Court of Claims, whether reference be had to the claimant's demand, or to the defence, or to any set-off, or counter-claim which the government may assert, are not controlled by the Seventh Amendment. They are not suits at common law within its true meaning. The government cannot be sued, except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits. It may restrict the jurisdiction of the court to a consideration of only certain classes of claims against the United States. Congress, by the act in question, informs the claimant that if he avails himself of the privilege of suing the government in the special court organized for that purpose, he may be met with a set-off, counter-claim, or other demand of the government, upon which judgment may go against him, without the intervention of a jury, if the court, upon the whole case, is of opinion that the government is entitled to such judgment. If the claimant avails himself of the privilege thus granted, he must do so subject to the conditions annexed by the government to the exercise of the privilege. Nothing more need be said on this subject.

The remaining objection against the judgment in favor of the government upon its counter-claim deserves notice at our hands. It is, in substance, this: That the Secretary of the Navy, the Second Comptroller, and the Fourth Auditor having examined the claim of Lieutenant McElrath, and, with full knowledge of all the facts, decided that he was legally entitled to half-pay and allowances for the period in question, the amount paid him cannot be reclaimed because of the subsequent discovery that, in point of law, he was not an officer in

the Marine Corps during the period for which he was allowed such half-pay. This view is controverted by the Attorney-General, who contends that the right of the government to reclaim money paid out of the treasury under a mere mistake of law is not subject to the same limitations which, under like circumstances, would be applied between individuals. The Attorney-General goes even further, and insists that whether the mistake be one of fact or of law, or of both, the government may always recover from third persons money improperly paid out of the public treasury by its accounting officers, not in pursuance of previous judicial determination. Whether the one or the other of these views, in the broad terms in which they are announced, is correct, we will not now inquire. For if the general rule applicable in such cases would preclude the government from reclaiming money which had been paid under a mistake of law simply, that rule is inapplicable under the circumstances disclosed in the present case.

Had the appellant rested upon the settlement of his account by the proper officers of the government, his right to invoke the general rule, to which we have referred, would have been entitled to more consideration than it can now receive. Upon receiving the amount awarded to him by the representatives of the government, he distinctly announced his purpose not to abide by their settlement of his accounts; but, in disregard thereof, to demand an additional sum upon the basis of full pay and allowances from June 20, 1866, to July 10, 1873.

This suit itself invites the court to go behind that settlement, to re-examine all the questions arising out of the appellant's claim for full pay and allowances, and to correct the error which he insists was committed to his prejudice by the accounting officers of the government. The government, declining to plead the settlement of 1874 in bar of the suit, meets him upon his own chosen ground, and, insisting that its officers, misapprehending the law, paid to him out of the treasury money to which he was not legally entitled, asks, as we think it may rightfully do, judgment for the amount thus improperly paid to him.

Judgment affirmed

SWIFT v. SMITH.

1. A party who, before its maturity and for a valuable consideration, purchases mercantile paper from the apparent owner thereof acquires a right thereto which can only be defeated by proof of bad faith or of actual notice of such facts as impeach the validity of the transaction.
2. A., to secure the payment of his note to B., executed to C. a deed of trust of land of even date therewith, which was duly recorded. A. afterwards conveyed the land to D., and it became the property of C. through sundry mesne conveyances duly recorded, each of which, including that to C., recited that the land was subject to the deed of trust. C. then, to secure the payment of certain bonds, made a deed of trust of the land, which was duly recorded; and subsequently there was filed for record an instrument executed by him, purporting to release to his grantor "all the right, title, interest, claim, and demand" which he, C., had acquired by virtue of the trust-deed executed to him by A. to secure the note. The release did not acknowledge the payment of the note. C. thereafter made another deed of trust. E. was, long prior to the execution of the conveyances, except the deed of trust and that from A. to D., the lawful holder of A.'s note, it having for a valuable consideration been duly assigned to him before its maturity. *Held*, that E. was entitled to the lien created by A.'s deed of trust.
3. The court adheres to the rule announced in *Brine* v. *Insurance Company* (96 U. S. 627), touching the statutory right of redeeming mortgaged lands in Illinois after a judicial sale under a decree of foreclosure of a mortgage or deed of trust.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The facts are stated in the opinion of the court.

Mr. William C. Goudy for the appellants.

Mr. William T. Burgess and *Mr. Van H. Higgins*, *contra*.

MR. JUSTICE STRONG delivered the opinion of the court.

The appellants complain of the decree of the Circuit Court because it adjudged that the complainant, Janet Smith, as administratrix of David Smith, deceased, had a lien on the lots described in the bill, by virtue of the deed of trust purporting to have been made by George N. Williams to Obadiah Jackson on the first day of October, 1868, and because it adjudged that lien to be prior to the lien in favor of Joseph Swift and Edwin Swift, and that in favor of Elizabeth Carroll and Ellen Carroll. There are other objections to the decree, but the two mentioned are the most important, for they strike at all the relief sought by the complainant's bill.

Both the defendants below (now appellants) and the complainant claim under Charles C. Waite, who, it is agreed, was the owner of the lots on the first day of October, 1868. On that day Charles C. Waite made his deed of the lots to one George N. Williams, which was duly recorded on the twenty-fourth day of the same month. To secure the payment of part of the purchase-money, Williams gave two promissory notes, both dated Oct. 1, 1868, payable to the order of Charles C. Waite, — one for $6,000, payable in one year from its date, and the other for $30,000, payable four years after its date, with interest at the rate of eight per cent, payable semi-annually. On the same day (October 1) Williams made and delivered his deed of trust of the lots, sold to him by Charles C. Waite, to Obadiah Jackson, to secure payment according to the tenor of the promissory notes he had given. This deed was duly acknowledged and recorded concurrently with Waite's deed to him. In effecting the sale from Waite to Williams, and in taking the notes and security for the payment of the purchase-money, Jackson was the attorney and agent for the vendor, and during some years thereafter the interest on the $30,000 note appears to have been paid through him. The $6,000 note was paid at its maturity. The other note came into the hands of Waite, the vendor, then living in New York, and he soon afterwards transferred and indorsed it to the order of his brother, Silas M. Waite, who subsequently, and before it fell due, indorsed it generally in blank to Obadiah Jackson. Thus Jackson became clothed with apparent ownership of the note, and with apparent power to transfer it by his indorsement.

On the eighteenth day of April, 1871, Jackson borrowed from David Smith, the complainant's intestate, the sum of $31,500, giving his promissory note therefor, and to secure the payment of his note he indorsed and delivered to Smith the Williams note for $30,000 as a collateral. This was nearly a year and a half before its maturity. At the time when the note was thus indorsed to Smith there were entries upon its back of payments of interest upon it up to May 17, 1871. These entries purported to be acknowledgments of "S. M. Waite by O. Jackson." There was also a regular chain of indorsements by Charles C. Waite, the payee, to Silas M. Waite

or order; by Silas M. Waite to Obadiah Jackson or order, fol lowed by an indorsement by Obadiah Jackson in blank. There was also on the margin of the note the following: "This note secured by trust-deed of even date herewith, duly stamped."

Thus far the facts appear without any real controversy, and unless there is something in the case to qualify them, they unquestionably establish that on the 18th of April, 1871, Smith became the *bona fide* holder of the $30,000 note for value paid, and as such entitled to the benefit of the deed of trust given by Williams to Jackson to secure its payment. Though he took it only as a collateral security for a loan made to Jackson at the time, he was entitled to the protection of a purchaser for value, without notice of anything to impeach his right.

Conceding, what appears to be more than probable, that Jackson was not, in fact, the owner of the note when he transferred it to Smith, that he simply held it as agent or attorney of S. M. Waite for collection, and that in transferring it to Smith he perpetrated a fraud upon the true owner, it is still certain that he was clothed by Waite with power to transfer the ownership as he did. Waite's indorsement of the note to him gave him that power; and, though its exercise was a fraud, if Smith advanced his money in good faith, relying upon Jackson's apparent ownership, he was justified in so doing, and S. M. Waite, who enabled Jackson to negotiate the note, thereby lost his title. He was bound by Jackson's act.

There is nothing in the case to show that Smith's purchase was not in good faith. There was nothing upon the note, nor anything in the indorsement thereon, to notify him that it did not belong to Jackson, both legally and equitably. It was mercantile paper, and not due. One who purchases such paper from another, who is apparently the owner, giving a consideration for it, obtains a good title, though he may know facts and circumstances that cause him to suspect, or would cause one of ordinary prudence to suspect, that the person from whom he obtained it had no interest in it, or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained those facts. *Goodman* v. *Simonds*, 20 How. 343. He can lose his right only by actual notice or bad faith. It is true that if the bill or note be so marked on its

face as to show that it belongs to some other person than the one who offers to negotiate it, the purchaser will be presumed to have knowledge of the true owner, and his purchase will not be held to be *bona fide*. *Fowler* v. *Brantly*, 14 Pet. 318. Nothing of this kind existed in the present case. Everything upon the note tended to show that it belonged absolutely to Jackson when Smith bought it. And we fail to discover anything in the entries of interest payments, or in any other circumstances, that should have aroused even suspicion to the contrary.

We are unable, therefore, to comprehend how it can be maintained, as the appellants contend, that the note did not belong to the complainant, but belonged to Silas M. Waite. Whatever may have been the fact before its indorsement to David Smith, and even after its indorsement to Jackson, Waite was estopped from asserting any claim to it by its transfer to Smith. It is true Waite is not a party to this suit. The decree does not bind him. But there is enough without the decree to estop him. He was examined as a witness for the appellants on the 12th of May, 1877. Then, if not before, he was informed that the note had been transferred to Smith, and that Smith's administratrix was proceeding to collect it. Plainly, then, it became his duty to assert his claim to it, if any he then had. He could not innocently lie by without intervention, or any action to vindicate his claim, while she was proceeding to enforce the trust. His laches, if he had any right, was inexcusable. But he made no movement in this case, and, so far as it appears, none elsewhere.

Without further remark upon this part of the case, we think we have said enough to warrant the conclusion at which we have arrived, that the complainant's intestate, on the 18th of April, 1871, became the owner of the note, and thereby entitled to the benefit of the trust declared in the deed of Williams to Jackson.

The appellants, however, contend that no lien was created by that deed, because, as they assert, Williams was a fictitious person, or an *alias* of Jackson, and, therefore, that the pretended deed was void, since no man can convey to himself. This is a strange position for the appellants to take. If there was no

such person as Williams, then Waite's deed to Williams was a nullity, for there was no person to take, and, as all the rights which the appellants assert come from Waite through Williams (as will appear hereafter), they have no interest in resisting the demand of the complainant, and are not entitled to be heard in the case. And so, as all the rights they assert are by virtue of a deed subsequently made by Williams (a deed hereafter to be noticed), it is not easy to see how they can have any standing; or, if Williams was but another name for Jackson, and Waite's deed was made to Jackson under the name of Williams, then the note, though signed by the name George N. Williams, was Jackson's note, and the trust-deed signed by the same name would be construed as a declaration of trust for the security of the note, equivalent to a covenant to stand seised to uses for the holder. But we are of opinion that Williams was not a myth. Beyond doubt Waite's deed was made to a person calling himself Williams, and made to the same person who signed the note and signed and acknowledged the deed of trust. Whether that was his real name or not is immaterial. He appeared before the notary and acknowledged the deed as his. He was not Jackson, it is clear. The evidence that the witnesses called in 1877 knew no such person as George N. Williams, in a city containing several hundred thousand inhabitants, is hardly worthy of respect as proof that no such person was in Chicago in 1868. The existence of the lien, or of the trust declared by the deed, is not to be disproved by such evidence.

Concluding, then, that David Smith, on the 18th of April, 1871, obtained a lien on the lots described in the bill by virtue of the deed of trust from Williams to Jackson, we come to consider the second leading objection urged against the decree of the Circuit Court. It is that the court erred in decreeing that lien to be prior to the liens in favor of the appellants Swift and Carroll.

To comprehend this assignment of error, it is necessary to observe the facts as they appear in the record.

On the fifth day of October, 1868, Williams, who had then become the purchaser of the lots, and who held them subject to his deed of trust to Jackson, sold and conveyed them by

warranty deed to Mary P. Moody for the consideration of $60,000, subject to the deed of trust to secure the payment of the $30,000 note which the grantee agreed to assume and pay as part of the consideration of the purchase. This deed was recorded Oct. 24, 1868.

On the 17th of May, 1871, Mary P. Moody, by warranty deed, recorded May 25, 1871, conveyed the lots, for the consideration of $45,000, to Charles V. Dyer, subject to the trust-deed aforesaid, describing it as given to secure the note for $30,000, which amount, with interest from date, the grantee covenanted to pay as part of the consideration.

Afterwards, on the first day of June, 1872, Charles V. Dyer and wife, by deed of that date with warranty, conveyed the lots to Obadiah Jackson aforesaid, expressly subject "to a trust-deed given by George N. Williams to Jackson, dated Oct. 1, 1868, . . . to secure a certain note on which is due $30,000 and interest." This deed was filed for record June 18, 1872.

Subsequently Jackson, with his wife, made a deed of trust of the same property to Norman Perkins to secure the payment of an indebtedness by two bonds, each for $25,000, given by Jackson, one to Joseph Swift and the other to Edwin Swift. This deed was dated June 1, 1872, acknowledged June 29, 1872, and filed for record Aug. 3, 1872.

On the same day, Aug. 3, 1872, there was filed for record an instrument puporting to be a release by Jackson, to Charles V. Dyer, for the consideration of one dollar, of the right, title, interest, claim, and demand of him, the said Jackson, which he had acquired by virtue of the trust-deed given to him by Williams to secure payment of the $30,000 note. This release was dated Oct. 2, 1871. It was not acknowledged until Aug. 3, 1872, the day when the deed of trust to Perkins was filed for record, nor did it acknowledge the payment of the note.

On the thirteenth day of November, 1876, Jackson and wife made a second deed of trust, conveying the lots with other property to George Chandler to secure the payment of notes which he had given to Elizabeth Carroll and Ellen Carroll. This deed was filed for record on the next following day.

This recital of the conveyances exhibits the fact that the

lien of the trust-deed to Jackson, given to secure the payment of the note for $30,000, was long prior in time to the liens of the Messrs. Swift, and Elizabeth and Ellen Carroll, and it was certainly in existence on the 18th of April, 1871, when that note was indorsed to Smith, the complainant's intestate.

But it is earnestly insisted by the appellants that the act of Jackson in making the release to Dyer protects them against the Williams deed of trust. That the release was a gross fraud upon the rights of Smith, the holder of the Williams note, is plain enough, and we think both the Swifts and the Carrolls had constructive, if not actual, notice that it was fraudulent. They were bound to know what was in the line of their title, that title being upon record. They are presumed to have known, and they are affected by the recitals in the deed under which they assert their rights. The trust-deed to Jackson informed them of the trust to protect the $30,000 note, and informed them that when the release was made and put upon record the note had not matured. The deeds to Mrs. Moody, to Dyer, and from Dyer to Jackson, all recited the continued existence of the debt, down to June, 1872, and each grantee, including Jackson, assumed its payment. The record assured them that Jackson was the owner of the lots when the release to Dyer was made, and that Dyer had no interest in the trust-deed to be released. They, therefore, were informed that the release was substantially a release by Jackson to himself of a debt which he had assumed to pay. Even if his power to execute the trust confided in him by the trust-deed was not extinguished by his acquisition of the property, it was evident that he could not release the lien, while he remained the owner of the lots, without a gross abuse of his trust. In regard to Perkins, who was the trustee in Jackson's deed to secure the Swifts' loans, and who was their attorney to examine the title before the loans were made and the trust-deed was executed, it appears that he knew there was no release of the trust for the protection of the Williams note, and required one to be filed. The release was brought to him by Jackson, unacknowledged. It was, therefore, in Jackson's possession, and, in fact, Dyer had never seen it. It was dated in 1871, October 2, and Perkins was informed that was not the date when

the instrument was made. Jackson told him, indeed, it was the date when the debt was paid; but he was not authorized to rely upon Jackson's assertion, more especially when he had before him, in Dyer's deed of the lots to Jackson, the acknowledgment that the note was unpaid on the first day of June, 1872, nine months after the time when Jackson affirmed it had been paid, and had in view also Jackson's assumption, at that time, to pay it. The evidence leaves no doubt that the release was not made until August, 1872, when it was put upon record. Then Jackson, being the owner of the lots subject to the operation of the Williams deed of trust, was in such a situation that he could not, without an abuse of his trust, destroy the rights of the holder of the note. It is impossible, therefore, to maintain that there was not enough on the face of the recorded title under which the Swifts claim, and in the facts attending the execution of the release, to make it their duty to inquire whether the Williams note had been in fact paid, — enough to apprise them that the holder of that note could not be postponed or injured by the fraudulent release.

The other appellants are in no better condition. When the deed of trust was made to Chandler to secure the debt due to the Carrolls, the prior trust protecting the Williams note was on the record in the line of their title. They were affected by notice of it. And though the subsequent release to Dyer also appeared upon the record, the fact that Dyer had no interest in the property when the release was acknowledged and recorded; that Jackson was then the owner; that he then held the lots under a deed from Dyer, declaring the property to be subject to the payment of the $30,000 note, which he assumed to pay; that the note was not then mature, and that, therefore, the release was practically a release by Jackson to himself, — these facts were all before them when they took their lien, that is, the trust-deed to Chandler. The Carrolls were dealing with one who they knew had been a trustee for the holder of the Williams note, and who was still such trustee, unless the trust had been extinguished, or transferred. The facts by which they were confronted were more than enough to put them upon inquiry whether the Williams note had been

in fact paid. They revealed a plain abuse of his trust by Jackson, from which, with the knowledge of it that they must be presumed to have had, they could derive no advantage. In the face of it they could not obtain a priority over the earlier equity held by Smith.

We conclude, therefore, that the Circuit Court correctly decided that the complainant has a lien on the lots described in the bill by virtue of the deed of trust purporting to have been made by George N. Williams to Obadiah Jackson, and that the lien is prior to the liens held by the Messrs. Swift and by the Carrolls.

We may add that there is no evidence of such laches as should postpone the complainant's lien to those of the appellants, or either of them.

It is agreed, however, that in the decree in the Circuit Court there was an error in calculating the amount due to the complainant. The amount is too large by $554.27. The sum decreed to the complainant should have been $34,101.73.

We think, also, the court erred in not according to the defendants the right of redemption after the sale ordered by the master, according to the provisions of the statute of the State. In *Brine* v. *Insurance Company* (96 U. S. 627) we held that the statutory right of redemption after a judicial sale, under a decree of foreclosure of a mortgage, or deed of trust, is a rule of property in Illinois, and that it must be accorded in the Federal courts equally as in those of the State. It may be admitted that if the sale ordered in this case had been made by the trustee named in the deed of trust, or by a substitute under the power which the deed gave him, and made in accordance with its directions, no right of redemption would exist. But such was not the sale directed. A strict foreclosure was not decreed. The bill prayed for nothing of the kind. It prayed for a sale, in default of payment, under the order and decree of the court, and the court decreed that its master should make the sale, after giving notice of the time and place thereof, according to the course of practice of the court, not according to the provision of the trust-deed. Henry W. Bishop, it is true, was substituted as trustee in place of Jackson, but he was one of the masters of the court, and he was

ordered to sell as *master*. He was required to make a report to the court, to pay into court any surplus arising from the sale, there to abide the court's order. The decree also contemplated a report of the sale by the master, and a confirmation of it by the court. The sale, therefore, as ordered, was in all respects a judicial sale, instead of a sale by the trustee under the power conferred by the deed. Hence it comes within the rule declared in *Brine* v. *Insurance Company*, and the right to redeem should have been preserved in the decree.

For this error, as well as for the mistake in the amount adjudged to be due the complainant, the decree must be reversed. In all other particulars the decree was correct.

The decree will be reversed, and the record remitted with instructions to enter a decree in accordance with this opinion; and it is

So ordered.

PENNSYLVANIA COMPANY *v.* ROY.

1. A carrier of passengers for hire is bound to observe the utmost caution, and is responsible to them for such injuries received in the course of their transportation as might have been avoided or guarded against by his exercise of extraordinary vigilance, aided by the highest skill.
2. Such caution and vigilance extend to all the appliances and means used by him in transporting them. He must, therefore, provide cars or vehicles adequate, that is, sufficiently secure as to strength and other requisites, for their safe conveyance, and he is liable in damages if, by reason of the slightest negligence or fault in that regard, injury results to a passenger.
3. A passenger purchased from a railroad company a ticket over its line, and, at the same time, from a palace-car company, a ticket entitling him to a berth in one of its sleeping-cars, constituting a part of the train of the railroad company. In the course of transportation he was injured by the falling of a berth in the sleeping-car in which he was at the time riding. *Held*, that for the purposes of the contract with the railroad company for transportation, and in view of its obligation to use only cars that were adequate for safe conveyance, the palace-car company, its conductor and porter, were, in law, the servants and employés of the railroad company, and that the negligence of either of them, as to any matters involving the safety or security of passengers, was that of the railroad company.
4. In such case, the injured passenger being entitled only to compensatory dam-

ages, evidence as to his poverty, or the number and ages of his children, is irrelevant.

5. Where, before the final submission of the case to the jury, irrelevant evidence, which had been admitted, was withdrawn, and they were instructed to disregard it, — *Held*, that an exception to the action of the court will not be sustained, the presumption being, so far as this court is concerned, that, under such circumstances, the jury based their verdict upon legal evidence only.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The facts are stated in the opinion of the court.

Mr. J. T. Brooks and *Mr. George Willard* for the plaintiff in error.

Mr. John Van Arman, *contra.*

MR. JUSTICE HARLAN delivered the opinion of the court.

This is a writ of error from a judgment for the sum of $10,000, the amount assessed as damages sustained by the defendant in error, in consequence of personal injuries received while riding, as a passenger, in a sleeping-car which belonged to the Pullman Palace Car Company, but constituting, at the time the injuries were received, a part of a train of cars managed and controlled by the Pennsylvania Company, as lessee and operator of the Pittsburg, Fort Wayne, and Chicago Railway. The action was commenced in the Supreme Court of Cook County, Illinois, against the Pennsylvania Company, the Pittsburg, Fort Wayne, and Chicago Railroad Company, and the Pullman Palace Car Company. It was subsequently dismissed by the plaintiff against all the defendants except the Pennsylvania Company, and then removed for trial into the Circuit Court of the United States for the Northern District of Illinois, where the judgment complained of was rendered.

The facts set forth in the bill of exceptions, so far as it is material to detail them, are these: —

On the 5th of June, 1876, Roy, the defendant in error, purchased at the office of the lessee company, in the city of Chicago, a "first-class railroad ticket" from that city to Philadelphia, over the line of that company, paying therefor the sum of $14.40. At the same time and place, and of the same

person, he purchased a sleeping-car ticket, issued by the Pullman Palace Car Company, for the route between the same cities, and for that ticket he paid the additional sum of $5. He took the train the same day, going immediately into the section of the sleeping-car corresponding to his ticket.

The next morning, at Alliance, Ohio, upon the invitation of a friend, travelling upon the same train, he entered the sleeping-car in which that friend was riding, and there engaged with him in conversation. While so engaged, the upper berth of the section in which they were sitting fell. Thereupon the porter of the sleeping-car came at once and put up the berth, saying it would not fall again. Shortly thereafter the berth fell a second time, striking the plaintiff upon the head, injuring his brain, incapacitating him from pursuing his vocation, and necessitating medical treatment.

After the second falling of the berth, the brace or arm supporting it was found to be broken.

The evidence introduced by the plaintiff tended also to show that the Pennsylvania Company provided cars in which passengers having railroad tickets could ride without purchasing a sleeping-car ticket; that Roy had much experience in travelling, and would have gone into one of those cars had he not purchased a sleeping-car ticket; that at the time he purchased it he did not know what company ran the sleepers, but upon taking the train he ascertained it was a Pullman car; that the Pullman Palace Car Company was engaged in furnishing cars to be run in the trains of railroad companies; that, besides the general conductor of the train, there was a conductor, in uniform, and a porter, whose duty it was to make up the berths and attend to the wants of passengers occupying the sleeping-car.

Upon the trial the plaintiff introduced a time and distance card of the defendant corporation, issued, published, and circulated by that company during the year 1876, prior to the date of his injuries. That card, referring to the "Fort Wayne and Pennsylvania R. R. line," stated that three express trains left Chicago daily, one "*with popular vestibule sleeping-car*," one "with drawing-room and hotel car," and one "*with drawing-room sleeping-car.*" It gave notice that "passage, excursion,

and sleeping-car tickets" could be purchased at the defendant company's office in Chicago. Referring to the "Fort Wayne and Pennsylvania line," the same card announced that "no road offers equal facilities in the number of through trains, *equipped with Pullman palace sleeping-cars.*" It states, among the advantages of the "Pittsburg, Fort Wayne, and Pennsylvania through line," that the latter was the "only line running three through trains, *with Pullman palace-cars*," and "the only line *running sleeping-cars* from Chicago and intermediate stations to Philadelphia without change." The same card gave the rates charged for berths and sections in Pullman sleeping-cars from Chicago to points east of that city.

The defendant, to maintain the issues on its part, offered to prove —

1. That the sleeping-car in which the accident occurred, and all the sleeping-cars then and theretofore on the defendant's line, since the 27th of January, 1870, were owned by the Pullman Palace Car Company, a corporation of the State of Illinois, and not by the defendant; that said sleeping-cars were run in the same trains with the defendant's cars; that holders of rail road tickets were entitled to ride in said sleeping-cars, provided they also held sleeping-car tickets.

2. That the Pullman Palace Car Company, and it only, issued tickets for sale, entitling passengers to ride in said sleeping-cars; that such tickets were plainly distinguishable from railroad tickets, and were sold at offices established by said company, and indicated as places for the sale of such tickets; that the plaintiff purchased the sleeping-car ticket of the same person of whom he bought the railroad ticket; that the office where purchased indicated by plain lettering upon its door that it was a place for the sale of Pullman Palace Car Company tickets, as well as railroad tickets.

3. That the Pullman Palace Car Company employed persons to take charge of its cars, and the latter, whilst in use, were in the immediate charge of a conductor and a porter employed by that company; that such conductor and porter were the only persons who had authority to manage and control the interior of said cars, and the berths and seats and the appurtenances thereto.

To this proof the plaintiff objected, and the objection was sustained, to which ruling the company excepted.

The court thereupon charged the jury that the proof tended "to show that the injury was received by reason of the negligence of the defendant's agents or servants, or by some negligence in the construction of the car in which the plaintiff was riding." To that charge the company at the time excepted, upon the ground that it was unsupported by the testimony, and because it assumed as a fact that the persons in charge of the sleeping-car were the company's agents or servants.

The court further charged the jury that "the defendant has offered in your presence to prove that the car in which the plaintiff was injured was not the car or the actual property of the defendant, but was the property of another corporation. But I instruct, as a part of the law of this case, that if the car composed a part of the train in which the plaintiff and other passengers were to be transported upon their journey, and the plaintiff was injured while in that car, without any fault of his own, and by reason either of the defective construction of the car or by some negligence on the part of those having charge of the car, then the defendant is liable."

To that charge also the defendant excepted.

We are of opinion that there was no substantial error, either in excluding the evidence offered by the defendant, or in the charge to the jury. The court only applied to a new state of facts, principles very generally recognized as fundamental in the law of passenger carriers. Those thus engaged are under an obligation, arising out of the nature of their employment, and, on grounds of public policy, vigorously enforced, to provide for the safety of passengers whom they have assumed, for hire, to carry from one place to another. In *Philadelphia & Reading Railroad Company* v. *Derby* (14 How. 468), it was said that when carriers undertake to convey persons by the powerful and dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence, — that the personal safety of passengers should not be left to the sport of chance, or the negligence of careless agents. This doctrine was expressly affirmed in *Steamboat New World* v. *King*, 16 id. 469. In *Stokes* v. *Saltonstall* (13 Pet. 181),

affirming the decision of Mr. Chief Justice Taney on the circuit, we said, that although the carrier does not warrant the safety of the passengers, at all events, yet his undertaking and liability, as to them, go to the extent that he or his agents, where he acts by agents, shall possess competent skill, and, as far as human care and foresight can go, he will transport them safely. The principles there announced were approved in *Railroad Company* v. *Pollard* (22 Wall. 341), where, speaking by the present Chief Justice, we said that we saw no necessity for reconsidering *Stokes* v. *Saltonstall.*

These and many other adjudged cases, cited with approval in elementary treatises of acknowledged authority, show that the carrier is required, as to passengers, to observe the utmost caution characteristic of very careful, prudent men. He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill. And this caution and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger. Among the duties resting upon him is the important one of providing cars or vehicles adequate, that is, sufficiently secure as to strength and other requisites, for the safe conveyance of passengers. That duty the law enforces with great strictness. For the slightest negligence or fault in this regard, from which injury results to the passenger, the carrier is liable in damages. These doctrines to which the courts, with few exceptions, have given a firm and steady support, and which it is neither wise nor just to disturb or question, would, however, lose much, if not all, of their practical value, if carriers are permitted to escape responsibility upon the ground that the cars or vehicles used by them, and from whose insufficiency injury has resulted to the passenger, belong to others.

The undertaking of the railroad company was to carry the defendant in error over its line in consideration of a certain sum, if he elected to ride in what is known as a first-class passenger car; with the privilege, nevertheless, expressly given in its published notices, of riding in a sleeping-car, *constituting a*

part of the carrier's train, for an additional sum paid to the company owning such car.

As between the parties now before us, it is not material that the sleeping-car in question was owned by the Pullman Palace Car Company, or that such company provided at its own expense a conductor and porter for such car, to whom was committed the immediate control of its interior arrangements. The duty of the railroad company was to convey the passenger over its line. In performing that duty, it could not, consistently with the law and the obligations arising out of the nature of its business, use cars or vehicles whose inadequacy or insufficiency, for safe conveyance, was discoverable upon the most careful and thorough examination. If it chose to make no such examination, or to cause it to be made; if it elected to reserve or exercise no such control or right of inspection, from time to time, of the sleeping-cars which it used in conveying passengers, as it should exercise over its own cars, — it was chargeable with negligence or failure of duty. The law will conclusively presume that the conductor and porter, assigned by the Pullman Palace Car Company to the control of the interior arrangements of the sleeping-car in which Roy was riding when injured, exercised such control with the assent of the railroad company. For the purposes of the contract under which the railroad company undertook to carry Roy over its line, and, in view of its obligation to use only cars that were adequate for safe conveyance, the sleeping-car company, its conductor and porter, were, in law, the servants and employés of the railroad company. Their negligence, or the negligence of either of them, as to any matters involving the safety or security of passengers while being conveyed, was the negligence of the railroad company. The law will not permit a railroad company, engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping-car company whose cars are used by the railroad company, and constitute a part of its train, to evade the duty of providing proper means for the safe conveyance of those whom it has agreed to convey. 2 Kent, Com. 600, 12th ed.; 2 Parsons, Contracts, 218, 219, 6th ed.; Story, Bailments, sects. 601, 601 *a*, 602; Cooley, Torts, 642; Wharton, Negli-

gence (2d ed.), sect. 627 *et seq.*; Chitty, Carriers, 256 *et seq.*, and cases cited by the authors.

It is also an immaterial circumstance that Roy, when injured, was not sitting in the particular sleeping-car to which he had been originally assigned. His right, for a time, to occupy a seat in the car in which his friend was riding was not, and, under the facts disclosed, could not be questioned.

Whether the Pullman Palace Car Company is not also, and equally, liable to the defendant in error, or whether it may not be liable over to the railroad company for any damages which the latter may be required to pay on account of the injury complained of, are questions which need not be here considered. That corporation was dismissed from the case, and it is not necessary or proper that we should now determine any question between it and others.

Upon the trial below, the plaintiff was allowed, against the objection of the defendant, to make proof as to his financial condition, and to show that, after being injured, his sources of income were very limited.

This evidence was obviously irrelevant. The plaintiff, in view of the pleadings and evidence, was entitled to compensation, and nothing more, for such damages as he had sustained in consequence of injuries received. But the damages were not, in law, dependent in the slightest degree upon his condition as to wealth or poverty. It is manifest, however, from the record, that the learned judge who presided at the trial subsequently recognized the error committed in the admission of that testimony. After charging the jury that the measure of plaintiff's damages was the pecuniary loss sustained by him in consequence of the injuries received, and after stating the rules by which such loss should be ascertained, the court proceeded: "But the jury should not take into consideration any evidence touching the plaintiff's pecuniary condition at the time he received the injury, because it is wholly immaterial how much a man may have accumulated up to the time he is injured; the real question being, how much his ability to earn money in the future has been impaired."

Notwithstanding this emphatic direction that the jury should

exclude from consideration any evidence in relation to the pecuniary condition of the plaintiff, the contention of the defendant is, that the original error was not thereby cured, and that we should assume that the jury, disregarding the court's peremptory instructions, made the poverty of the plaintiff an element in the assessment of damages; and this, although the record discloses nothing justifying the conclusion that the jury disobeyed the directions of the court. To this position we cannot assent, although we are referred to some adjudged cases which seem to announce the broad proposition that an error in the admission of evidence cannot afterwards be corrected by instructions to the jury, so as to cancel the exception taken to its admission. But such a rule would be exceedingly inconvenient in practice, and would often seriously obstruct the course of business in the courts. It cannot be sustained upon principle, or by sound reason, and is against the great weight of authority. The charge from the court that the jury should not consider evidence which had been improperly admitted, was equivalent to striking it out of the case. The exception to its admission fell when the error was subsequently corrected by instructions too clear and positive to be misunderstood by the jury. The presumption should not be indulged that the jury were too ignorant to comprehend, or were too unmindful of their duty to respect, instructions as to matters peculiarly within the province of the court to determine. It should rather be, so far as this court is concerned, that the jury were influenced in their verdict only by legal evidence. Any other rule would make it necessary in every trial, where an error in the admission of proof is committed, of which error the court becomes aware before the final submission of the case to the jury, to suspend the trial, discharge the jury, and commence anew. A rule of practice leading to such results cannot meet with approval.

There was, however, an error committed upon the trial, to which exception was duly taken, but which does not seem to have been remedied by any portion of the charge appearing in the bill of exceptions. The plaintiff was permitted, against the objection of the defendant, to give the number and ages of his children, — a son ten years of age, and three daughters

of the ages, respectively, of fourteen, seventeen, and twenty-one. This evidence does not appear to have been withdrawn from the consideration of the jury. It certainly had no legitimate bearing upon any issue in the case. The manifest object of its introduction was to inform the jury that the plaintiff had infant children dependent upon him for support, and, consequently, that his injuries involved the comfort of his family. This proof, in connection with the impairment of his ability to earn money, was well calculated to arouse the sympathies of the jury, and to enhance the damages beyond the amount which the law permitted; that is, beyond what was, under all the circumstances, a fair and just compensation to the person suing for the injuries received by him. How far the assessment of damages was controlled by this evidence as to the plaintiff's family it is impossible to determine with absolute certainty; but the reasonable presumption is that it had some influence upon the verdict.

The court, in a manner well calculated to attract the attention of the jury, withdrew from their consideration the evidence in regard to the financial condition of the plaintiff; but as nothing was said by it touching the evidence as to the ages of his children, they had the right to infer that the proof as to those matters was not withdrawn, and should not be ignored in the assessment of damages.

For this error alone the judgment is reversed, and the cause remanded for a new trial.

So ordered.

HALL v. LAW.

1. Proceedings for the partition of real estate in Indiana were instituted in the year 1832, in the Circuit Court of the county where it is situate. The record consists of an order appointing three commissioners to divide the land between the several proprietors, their report at the next term, and its confirmation by the court. The report complies in its details with the requirements of the statute, gives the boundaries of the land, sets forth with proper description the portion assigned to each proprietor, and is accompanied by a plat showing the tracts assigned. *Held*, that it is not a valid objection to the proceedings when they collaterally come in question that no petition or complaint appears in the record as the foundation of them.
2. When the recitals in the record show the jurisdiction of the court and its compliance with the statute, the order appointing commissioners is an adjudication affirming the sufficiency of the application and notice, which can be questioned only in a direct review of the proceedings in an appellate court.
3. An instrument gives color of title, — whether the grantor acts under authority of judicial proceedings or otherwise, — if by apt words of transfer it passes what purports to be the title; and the grantee's possession of the lands thereunder for the period mentioned in the Statute of Limitations bars the true owner's right of recovery.
4. Where the complainant is out of possession, and the determination in his favor is only preliminary to a decree against the defendant for the surrender of the possession, the suit, although in form a proceeding in equity, so nearly resembles the common-law action of ejectment as to justify the application of that statute.
5. The court, upon the facts of this case, holds that the claim made is stale, and without merit.

APPEAL from the Circuit Court of the United States for the District of Indiana.

The facts are stated in the opinion of the court.

Mr. James C. Denny and *Mr. Charles E. Marsh* for the appellants.

Mr. Asa Iglehart and *Mr. J. E. Iglehart, contra.*

MR. JUSTICE FIELD delivered the opinion of the court.

This is a suit to quiet the title to certain real property in the State of Indiana, of which it is charged that one William P. Hall, who died intestate in 1857, was seised in fee. By the law of Indiana, his real estate descended to the complainants.

The premises in controversy are situated in the city of Evansville, in that part known as Lamasco. They constitute a part of a fractional section in the subdivision of the public lands in a township of the State. A small stream runs through the section, known as Pigeon Creek, on the west of which four-sevenths of the section lie, and on the east three-sevenths. The premises in suit are on the west side of the creek.

In 1831, the deceased William P. Hall became the owner of two undivided sevenths of the section. In 1833, proceedings were taken in the Circuit Court of the county in which the section lies, at the instance of the possessor of an undivided interest, for a partition of the land and an assignment in severalty of the interests of the different owners. These proceedings resulted in a partition, by which the interest of Hall was set apart out of that portion of the section lying east of Pigeon Creek. If these proceedings are valid, the claim of the complainants, as the children and the widow of the deceased, is without foundation. He was divested of all interest in the property in controversy several years before his death.

The proceedings were taken under an act of the State, of February, 1831, entitled "An Act to provide for the partition of real estate," the first section of which enacts: —

"That when two or more persons are proprietors of any real estate, any of whom are desirous of having the same divided, it shall and may be lawful for the Circuit Court of the county where such real estate may be situate, on the application of any such person (notice of such application having been previously given by the party so applying for at least four weeks in some public newspaper in the State), to appoint three disinterested freeholders, residents of said county, not related to either of the parties, as commissioners for dividing the said estate; and said commissioners having previously taken an oath or affirmation, before some justice of the peace in said county, honestly and faithfully to execute the trust reposed in them as commissioners aforesaid, shall proceed to make division of said estate, as directed by the court, among the owners and proprietors thereof, according to their respective rights; which partition being made by the said commissioners, or any two of them, and return thereof being made by the said commissioners, in writing, under their hands, to said court, particularly describing the lots or portions allowed to each respective owner or proprietor, mention-

ing which of the owners or proprietors are minors, if any such there be, which return being acknowledged by the commissioners making the same, before any one of the judges of the court aforesaid for the said county, and accepted by the court, and entered and recorded in the clerk's office, shall be a partition of such lands, lots, and tenements therein mentioned." Rev. Laws of Ind., 1838, 426.

The record of the proceedings of the partition in this case consists of the order of the Circuit Court of Sept. 12, 1832, appointing three commissioners to divide the section between the several proprietors, and to report to the court at the next term; their report at the next term, in March, 1833, showing the partition made and the part assigned to each proprietor; the confirmation of the report at that term by the court, and its apportionment of the expenses of the partition among the proprietors.

The order appointing the commissioners recites that it was proved to the satisfaction of the court that David Miller (one of the proprietors) had given due and legal notice that he would, on the third day of the court (which was that day, September 12), make application for the appointment of commissioners to divide among the several proprietors thereof the fractional section.

The report gives the boundaries of the section, and sets forth with proper description the portion assigned to each proprietor. It complies in its details with the requirements of the statute and is accompanied with a plat of the land showing the tract assigned.

The validity of this partition is assailed because no complaint or petition of the applicant for the partition appears in the record as the foundation of the proceedings, and without one it is contended that they were void.

The statute does not in terms require the application of the proprietor seeking a partition to be presented in writing, or, if one be presented, to be filed among the records of the court. All that it designates as necessary to authorize the court to act is, that there should be an application for the partition by one or more joint proprietors, after giving notice of the intended application in a public newspaper for at least four weeks.

When application is made, the court must consider whether it is by a proper party, whether it is sufficient in form and substance, and whether the requisite notice has been given as prescribed. Its order made thereon is an adjudication upon these matters.

The recitals in the order show a compliance with the statute; they show jurisdiction in the court over the subject. That jurisdiction arises upon the presentation of the application, accompanied with proper proof of previous notice of it. The order of the court appointing the commissioners is a determination that the application is sufficient, and that due notice of it has been given. This conclusion is not open to collateral attack; it can only be questioned, on appeal or writ of error, by a superior tribunal invested with appellate jurisdiction to review it. *Voorhees* v. *The Bank of the United States*, 10 Pet. 449; *Thompson* v. *Tolmie*, 2 id. 157; *Comstock* v. *Crawford*, 3 Wall. 396.

The cases of *Lease* v. *Carr* (5 Blackf. (Ind.) 353) and *Shaw* v. *Parker* (6 id. 345), cited by complainants, do not support their position. In the first case, the Supreme Court of Indiana, having the proceedings in partition before it for review on writ of error, held that the petition of the appellant should show the extent and nature of his interest in the land, and that he holds it in common with the defendants, whose interests, if known to him, should also be stated; and that as the petition in that case was silent in these particulars, and merely requested the appointment of commissioners to divide the land, it was defective, and the order made thereon was erroneous. But the court did not hold or intimate that the order and subsequent proceedings were, from the defective character of the petition, absolutely void. It was the common case of the reversal of proceedings because of intervening error. If not thus corrected, the existence of the error in no respect impairs the validity and efficacy of the subsequent proceedings, or the order or judgment thereon. The distinction between erroneous and void orders and judgments is too familiar to call for extended observation, and is fully recognized, not only in the courts of Indiana, but in those of every State in the Union. *Hornor* v. *Doe*, 1 Ind. 130; *Doe* v. *Smith*, id. 451; *Doe* v. *Harvey*, 3 id.

104; *Ashley* v. *Laird*, 14 id. 222; *Cox* v. *Matthews*, 17 id. 367; *Evans* v. *Ashby*, 22 id. 15; *Waltz* v. *Borroway*, 25 id. 380; *Hawkins* v. *Hawkins*, 28 id. 67; *Comparet* v. *Hanna*, 34 id. 74; *Gavin* v. *Graydon*, 41 id. 559; *Burk* v. *Hill*, 55 id. 419; *Hays* v. *Ford*, id. 52; *Hunter* v. *Burnsville Turnpike Co.*, 56 id. 218; *Wiley* v. *Pavey*, 61 id. 457. The second case, *Shaw* v. *Parker*, also came before the Supreme Court on a writ of error, and follows in its decision *Lease* v. *Carr*. We see nothing in either to impeach the validity of the order of the Circuit Court of the county appointing the commissioners, or its order confirming their report. Thus confirmed, the report consti tuted, in the language of the statute, a partition of the lands described in it.

The complainants, treating as invalid the partition proceedings, sue for the undivided two-sevenths of that portion of the fractional section lying west of Pigeon Creek, and assume in their bill of complaint that the title of the defendant rests upon a deed made under a decree in a suit in chancery commenced against the deceased in 1836, three years after the alleged partition. It seems that a claim was made at that time that the two undivided sevenths of the fractional section were conveyed by their then owner, Nathaniel Ewing and his wife, to one William Prince, upon a condition which had failed; that upon the death of Prince, his estate being insolvent, the property had been sold by order of the Probate Court to one William Daniel, for forty-five dollars, and for the like sum had, by him and wife, been conveyed to the deceased William P. Hall; and the suit in chancery was brought by parties who had obtained another conveyance from Ewing and wife to set aside the probate sale, and to compel the deceased to convey his interest to them. The suit resulted in a decree directing the execution of a deed of the title and interest of the deceased to the complainants in that suit, of whom the defendant was one, by a commissioner appointed by the court. The decree describes the two undivided sevenths as being the same tract assigned to the deceased in the partition proceedings. The father of the deceased was appointed the commissioner, and he executed the deed ordered.

The complainants here assail the validity of this decree, as

being rendered without service upon the deceased, who was then a minor under ten years of age, upon an answer filed by a guardian *ad litem*, who was not authorized to waive service on his ward. It is not necessary to examine into the validity of the decree for this or other reasons. This deed purports to pass whatever title the deceased possessed in the lands conveyed under the probate sale, whether it be considered as the two undivided sevenths of the whole fractional section, or the tract assigned to him on the partition. It gave at least color of title. Whenever an instrument, by apt words of transfer from grantor to grantee, — whether such grantor act under the authority of judicial proceedings or otherwise, — in form passes what purports to be the title, it gives color of title. The deed of the commissioner in this case, with the return of the commissioners in the partition proceedings, gave such color. Even should they be considered as invalid, possession under them for the period prescribed by statute bars the right of the true owners as effectively as possession under the most perfect title. It is an absolute defence to the action of ejectment. And a suit in equity, brought after that period, for the determination of the title and for possession of the property, will not be entertained, as it is founded on a stale claim. As the statutes of limitations in most States, and in Indiana among them, apply in terms only to legal remedies, courts of equity are considered as bound by them only in cases of concurrent jurisdiction. In other cases they are said to act only by analogy, and not in obedience to the statutes. Though the present case is in form a suit in equity, and as the bill asks for an injunction it may be so treated, it is essentially a suit to recover the possession of the land. The complainants are out of possession, and the defendant, or parties claiming under him, are in possession. The determination in favor of the complainants' title is only preliminary to a decree for the surrender of possession. If not a concurrent remedy with the common-law action of ejectment, it so nearly resembles the latter as to justify the rule that in such cases the statute equally applies.

The defendant and his associates in the deed of the commissioner, or persons claiming under them, have been in possession of the entire fractional section for over forty years, and

during all this period have exercised acts of ownership of almost every kind. They have laid out the land into lots, blocks, streets, and alleys, and have made extensive improvements either upon them or in connection with them. They have also sold parcels to a large number of persons, who have gone into possession, and still hold them, and have erected buildings thereon. The town of Lamasco, laid out by them upon the land, reached a population of over ten thousand inhabitants before it was annexed to the city of Evansville, of which it now forms a part.

The statute of Indiana reserved to the deceased a right of action to recover the premises for five years after he came of age, and though he lived for ten years after that period, within the vicinity of the property, and was cognizant of the possession of the defendant and his associates, and of parties holding under them, of their claim of ownership and of their improvements, he made no attempt to disturb them in its possession, use, and enjoyment, or in the sale of portions of it.

The claim now set up by the complainants is a stale one, and, under the facts disclosed, without merit. The decree dismissing the bill must, therefore, be affirmed; and it is

So ordered.

WALKER v. REISTER.

A bill, filed by the assignee in bankruptcy of an insurance company against its former officers and directors, alleges that they had divided among themselves and friends certain bonds belonging to it, and prays for an accounting and relief. It appears from the proofs that the bonds were never the property of the company, but were, without consideration, borrowed, by some of its officers, for the fraudulent purpose of exhibiting them, as part of its assets, to the official examiners, thus furnishing evidence of its sound condition, and were afterwards returned, according to agreement, to their real owners. *Held*, that the bill was properly dismissed.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

The facts are stated in the opinion of the court.

Mr. Nathaniel Myers for the appellant.

Mr. James O. Broadhead, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

The appellant, who was assignee in bankruptcy of the North Missouri Insurance Company, filed his bill in equity in the District Court for the Eastern District of Missouri against the appellees, who had been the officers and directors of the corporation prior to the bankrupt proceedings. The District Court, after answer, replication, and voluminous depositions, dismissed the bill, and the Circuit Court affirmed that decree on appeal. From this latter decree the assignee appeals to this court.

The bill, in substance, sets forth that, at a certain date prior to the institution of proceedings in bankruptcy, the corporation was the owner of bonds of the counties of Macon, Schuyler, Knox, and Adair, and other securities, amounting in the aggregate to over $136,000; that the bonds were in the possession of the company in the month of May, 1873, when they were exhibited to the superintendent of the insurance department of the State of Missouri, and a similar officer of the State of Ohio, by the defendants, or some of them, as investments of the funds of the company, and as evidence to these superintendents of the sound condition of the company and its right to continue the business of insurance. The foundation of the relief sought is thus stated in the language in the bill: —

"Yet your orator further shows that, notwithstanding the premises, the said directors and officers, unmindful of their duty aforesaid, but intending to cheat and defraud the said insurance company and its creditors aforesaid, prevailed upon and procured the said treasurer [the treasurer of the company] to unite and co-operate with them, as in fact he did unite and co-operate with them, in parcelling out and distributing the said notes and bonds among themselves and their friends at some time prior to the nineteenth day of June, 1873, wholly without consideration whatever, and in gross disregard of their duty as such directors and officers of said company, and thereby and through the neglect of duty, and through the fraud and breach of trust of the said officers and directors of said company, the said bonds and notes became and were wholly lost to the said company and its creditors, and to your orator as assignee aforesaid."

The answer denied that the company ever owned the bonds and that they were so parcelled out and distributed among the defendants and their friends.

The clear result of a large amount of testimony in regard to the bonds in controversy is that they were borrowed from divers persons and corporations who owned them, or were placed in the temporary possession of the officers of the insurance company for the purpose of being shown to the examining superintendents as property of that company, with the understanding that as soon as the examination was over they should be returned to their owners; and that this was done. It is also established that the parties who actually owned the bonds were aware of the fraudulent use which was to be made of them, and were willing in this way to contribute to the deception practised on the official examiners.

Nothing of this, however, is alleged in the bill or is found in the answer. The relief sought is based squarely on the ground that the bonds in question, being in possession of the defendants as the property of the insurance company, were by them unlawfully converted to their own use, whereby the company and the creditors of the company, by reason of its insolvency, were defrauded of their value. The bill makes a case of conversion for which an action in the nature of trover at common law would lie, and it is difficult to see any sufficient ground for the interposition of a court of equity.

But, apart from this, it seems that unless the complainant has sustained both of the principal allegations of the bill, — namely, that the bonds were the property of the company, and that the defendants unlawfully converted them to their own use, — his bill was properly dismissed.

Now, the testimony makes it very clear that the defendants did not convert the bonds to their own use or distribute them among their friends, as alleged in the bill. It is also quite apparent that they received no consideration for the return of the bonds to their owners, and committed no fraud on the insurance company in the transaction, and that, in fact, they were acting with a mistaken zeal in what they supposed to be the interest of their corporation.

They do not, therefore, occupy the position of embezzlers of

funds intrusted to their charge by the company; but that is precisely the effect of the allegations of the bill which we have copied, and it is also the only inference to be drawn from the whole of its scope and tenor.

So, also, we do not think that the evidence establishes that the insurance company was ever the owner of these bonds. It never paid anything for them, nor gave consideration in any other way. It lost nothing by the transaction in which the bonds came into the possession of its officers and passed out of that possession.

It had not, therefore, any honest claim to the ownership of the bonds; and if the dishonest purpose for which they were used can be imputed to the corporate entity, it is very certain that when the transaction was over it could confer no rightful authority on that corporation to retain or reclaim the bonds. As between the insurance company and the owners of the bonds the title never passed from the latter, nor did any vested ownership pass to the former. How, then, can it be said that these officers cheated or defrauded the company? or that the bonds were lost to the company by their neglect or their fraud or breach of trust? How could the corporation lose what it did not own? How could it be cheated out of that to which it had no right? How could it be defrauded out of property belonging to others and in the hands of those who owned it?

A very ingenious argument is made by counsel of appellant, on which he places much reliance, to the effect that having proved that these bonds were once in the possession of the insurance company, and were not to be found when its assets were turned over to the assignee, he has made a *prima facie* case, and that defendants cannot set up in their defence the fraudulent transaction which shows their own guilt.

It is not necessary to decide here whether, if the complainant had brought an action of trover, and had proved before the jury by some competent witness that these bonds were in the hands of the officers of the company, who asserted them to be the bonds of the corporation, they would in defence have been permitted to show the facts we have stated because of the turpitude of their action in the matter. We need not decide this, for the reason that, in proving the possession of these bonds, the

complainant has proved at the same time the character of that possession. He has proved that the possession of the insurance company was not with claim of ownership, but it was a temporary loan, not of the bonds, but of their possession for a definite purpose, which being accomplished they were returned to their real owners. It was one transaction, and must be so considered in the broad view of a court of equity, — a transaction in which the fraudulent purpose is fatal to the title of the insurance company, or any right which that company could assert under it. A court of equity will not stop halfway in the investigation of a fraud which is quite apparent, to give one of the parties to it affirmative relief at the expense of the other. In such cases better is the condition of the defendant.

It is also argued that the fraud was against the creditors of the company, and the assignee can pursue the party who defrauded them.

To this there are several sufficient answers.

1. The bill is not framed on that foundation, but distinctly on the ground of a conversion of the funds of the company, which, if true, is to that extent a fraud on the company's creditors. But as we have already shown, the company was defrauded of nothing, because it did not own the bonds.

2. Though the bill alleges in a general way that the exhibition of these bonds was a fraud upon the creditors, it is difficult to see how that can be if the bonds were, as the bill alleges, at that time the property of the company. If that was so, the officers had a right, and were in duty bound, to exhibit them.

3. There is no allegation that any particular creditor ever became so, or was influenced in his action toward the corporation by reason of this exhibition of these securities, and it is denied in the answer that any creditor was so influenced, and no proof to establish the charge is given.

4. And, last, it seems to be reasonable that if any creditor was misled to his loss by this fraudulent misconduct of the officers of the company, he would have a corresponding right to a remedy in his own name against them to the extent of his individual injury, quite independent of the right of the

assignee to recover for property of the corporation embezzled or converted by these officers.

In short, whatever remedy there may exist to any one to pursue these parties and others for their share in this transaction, either at law or in equity, this bill, founded on a devastavit of assets of the company, — if language borrowed from a kindred branch of the law may be thus used, — cannot be sustained, because it is clear that the bonds which are said to have been converted were never the bonds of the bankrupt corporation.

Decree affirmed.

MERIWETHER v. GARRETT.

Upon consideration of the legislation of Tennessee, being chapter 10 of acts of 1879, entitled "An Act to repeal the charters of certain municipal corporations, and to remand the territory and inhabitants thereof to the government of the State," approved Jan. 30, 1879; chapter 11, entitled "A Bill to establish taxing districts in this State, and to provide the means of local government for the same," approved Jan. 30, 1879; and chapter 92, entitled "An Act to collect and dispose of the taxes assessed for municipal corporations in this State whose charters have been or may be repealed, or which may surrender their charters, and to provide for the compromise and make settlement of the debts of such distinct municipal corporations, respectively," approved March 14, 1879 (*infra*, pp. 477, 479, 490), the court *holds*: —

1. Property held by the city of Memphis for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing-places, fire-engines, hose and hose-carriages, engine-houses, engineering instruments, and generally all things held for governmental purposes, cannot be subjected to the payment of its debts. Upon the repeal of its charter, such property passed under the immediate control of the State, the power once delegated to the city in that behalf having been withdrawn.

2. The private property of individuals within the limits of the territory of the city cannot be subjected to the payment of the debts of the city except through taxation.

3. The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature.

4. Taxes levied according to law before the repeal of the charter, other than such as were levied in obedience to the special requirement of contracts entered into under the authority of law, and such as were levied under judicial direction for the payment of judgments recovered against the city, cannot be collected through the instrumentality of a court of chancery at the instance of the creditors of the city. Such taxes can only be collected under

authority from the legislature. If no such authority exists, the remedy is by appeal to the legislature, which alone can grant relief. Whether taxes levied in obedience to contract obligations, or under judicial direction, can be collected through a receiver appointed by a court of chancery, if there be no public officer charged with authority from the legislature to perform that duty, is not decided, as the case does not require it.

5. The receiver and back-tax collector appointed under the authority of the act of March 13, 1879, is a public officer, clothed with authority from the legislature for the collection of the taxes levied before the repeal of the charter. The funds collected by him from taxes levied under judicial direction cannot be appropriated to any other uses than those for which they were raised. He, as well as any other agent of the State charged with the duty of their collection, can be compelled by appropriate judicial orders to proceed with the collection of such taxes by sale of property or by suit, or in any other way authorized by law, and to apply the proceeds upon the judgments.

6. The bills in this case not having been framed with a view to any such purpose, cannot be amended so as to obtain relief against such receiver and back-tax collector.

APPEAL from the Circuit Court of the United States for the Western District of Tennessee.

On Feb. 28, 1879, Robert Garrett and others filed their bill in the court below against the City of Memphis, Tennessee, setting forth that they are the owners and holders of overdue and unpaid bonds and coupons and other evidences of her indebtedness to the amount of more than $100,000, upon much of which indebtedness they have secured judgments and writs of *mandamus* to compel the collection thereof, but that, owing to the malfeasance, misfeasance, and incompetency of her officers charged with the collection of taxes, a large proportion of those assessed and levied for many years past, and amounting to at least $2,500,000, are uncollected and unpaid, by reason of which she is insolvent; that her persistent failure to collect them is a fraud upon her creditors; that during each of the years 1875, 1876, 1877, and 1878 a large levy of taxes was made in obedience to writs of *mandamus*, but that by reason of her failure during each of those years to collect more than three-fifths of the amount thereof, and also of the taxes assessed and levied for general purposes, a large amount represented by the judgments remains unpaid; that the special levies so made, in which the complainants have a large interest, constitute a trust fund for the payment of their judgments which can only be used for that purpose, and that the

city's neglect and failure to press the collection thereof is a fraud upon them, against which a court of equity will relieve; that, outside of the power of a court to appoint a receiver to take charge of the assets of the city and collect the taxes so levied, it is, by an act of the legislature of Tennessee passed March 19, 1877, entitled "An Act to enable municipal corporations having more than thirty-five thousand inhabitants to settle their indebtedness," being chapter 71 of the acts of 1877, provided that upon the application of any person or persons who are the holders of any past-due and unpaid bonds, coupons, or other indebtedness, not less in amount than $100,000, of any municipal corporation having more than thirty-five thousand inhabitants, it shall be the duty of the Court of Chancery to appoint a receiver for such corporation; that the city's indebtedness, represented by judgments and otherwise, amounts to over $850,000, and that her population exceeds thirty-five thousand persons. They, therefore, pray that a receiver be appointed to take charge of her assets, including her tax books and bills for past-due and imposed taxes, and that he be clothed with the power conferred by said act of March 19, 1877, and such other power as may be necessary to enable him to collect all outstanding indebtedness and claims of every kind due to her, and to settle her debts, particularly those due to the complainants.

Chapter 71 of acts of 1877 enacts as follows: —

"SECT. 2. That the power to levy taxes of every description, and for any and every purpose whatever, is hereby taken away from said municipal corporations, and each and every officer and representative thereof, and said taxing power lodged in the legislature of the State, and not elsewhere; and that by virtue of article 11, section 9, of the Constitution of the State, in addition to the powers already conferred, the Chancery Court, for the purpose of settling the indebtedness of Memphis and other municipal corporations containing more than thirty-five thousand inhabitants, may appoint a receiver, and exercise such other powers as are hereinafter set forth.

"SECT. 3. That upon the application of any person or persons, who are the holders and owners of any past-due and unpaid bonds, coupons, or other indebtedness of said municipal corporations, not

less in amount than one hundred thousand dollars, it shall be the duty of the Chancery Court to appoint a receiver for said municipal corporations, who, as the officer of the court, and not otherwise, shall, under the order and instruction of the court, act for such municipal corporations.

"SECT. 4. That said receiver, together with two other citizens and property holders of said corporation, to be appointed by the court, shall constitute a commission to settle and compromise the indebtedness of said municipal corporation, by funding the same, at a rate not exceeding fifty-five cents in the dollar on judgments, and not exceeding fifty cents in the dollar for bonds or coupons past due, and at a less rate for the less valuable class of said indebtedness; and upon their action being confirmed by the court, the court shall direct the receiver to execute the necessary and proper compromise bonds and contracts; which bonds, when so executed, shall to all intents and purposes be the valid and binding obligations of said corporation; but it is understood and agreed that the holders of any of the bonds issued by the receiver as provided in this act shall have the option, after two years, to fund or exchange them at par, into bonds payable thirty years after the date of their issue, and bearing interest at the rate of six per cent per annum; said bonds shall be of the denomination of one thousand dollars each, and numbered consecutively from one to twenty-five hundred; the total amount of bonds issued under this act shall not exceed two and one-half millions of dollars.

"SECT. 5. That in order to enable said commission to make a settlement of said municipal indebtedness, as contemplated, it is hereby enacted: —

"1. That all bonds and matured coupons and judgments, and all paving scrip certificates issued by said corporation, and all receipts for money paid by tax-payers to paving contractors for making Nicholson and stone pavement, &c., by virtue of any contracts with said corporation, may be funded at such a rate not exceeding the maximum above mentioned, and into such bonds, bearing not exceeding six per cent per annum interest, as may be agreed on between the parties, the holder, and said commission.

"2. That all matured bonds and coupons, issued by virtue of any agreement made in pursuance of this act, shall be receivable for taxes, city dues, and indebtedness of every kind.

"3. That said municipal corporations are hereby prohibited from issuing scrip at any time, or bonds, while any bonds issued under

this act are outstanding, except such as may be issued in exchange, as hereinbefore provided in section 4 of this act.

"4. That, hereafter, for said municipal corporations, there shall not be levied a higher rate of taxation for general purposes, as defined in the charter, than one per cent for the next five years, and at no time thereafter for said purposes a tax exceeding one dollar and twenty-five cents on the hundred dollars.

"5. That an ample interest and sinking-fund tax shall be levied annually, and collected, to meet the maturing interest and retire and pay the bonds issued under this act, and that this tax shall be faithfully applied to the object proposed. The sinking-fund tax shall be paid into the hands of three sinking-fund commissioners, and the interest tax shall be paid into the hands of three interest commissioners; each and all of said sinking-fund and interest commissioners shall be appointed by the court, and shall be citizens of established integrity and responsibility, who shall give bond in sufficient amounts to cover the funds coming into their hands, and take an oath to faithfully execute their trusts; said bonds to be fixed by the court.

"6. That the provisions of this act may be made a part of the contract with the holders of any bond or coupon issued by reason of any agreement made under this act.

"7. That so much of sects. 38, 63, 64, and 66 of an act passed March 20, 1875, and all other acts as are in conflict with the provisions of this act, are hereby expressly repealed.

"SECT. 6. That the court shall appoint the interest and sinking-fund commissioners, and supply all official vacancies as they may occur in the different municipal departments, which, as to the ordinances affecting the same and in every other respect, remain unaffected, except in so far as they may conflict with the enforcement of the provisions of this act, in which event the court will so order as to carry out the true intent and purposes of this act: *Provided, however*, that all the offices not abolished by this act be filled by a popular vote, for the term of two years, at the time designated in the charter for the next regular municipal election.

"SECT. 7. That to carry into effect the true intent and provisions of this act, the legislature of the State hereby levies an annual tax of one dollar and sixty cents on each one hundred dollars' worth of taxable property and values within said municipal corporation (including the school tax, which shall not exceed ten cents), to be applied under the order and directions of the court in the payment of current expenses, interest on compromise bonds,

and the extinguishment of the indebtedness of said municipal corporations.

"SECT. 8. That this act shall take effect, and not before, when the sum of the tax *mandamuses* outstanding against any one of said municipal corporations shall amount in the aggregate to the sum of ($850,000) eight hundred and fifty thousand dollars.

"Passed March 19, 1877. Approved March 23, 1877."

On the day next after that upon which the complainants' bill was filed, the legislature of Tennessee passed the following acts: —

"CHAPTER 10, OF ACTS OF 1879.

"*An Act to repeal the Charters of certain Municipal Corporations, and to remand the Territory and Inhabitants thereof to the Government of the State.*

"SECT. 1. Be it enacted by the General Assembly of the State of Tennessee, that an act passed Dec. 1, 1869, entitled 'An Act to reduce the charter of the city of Memphis and the several acts amendatory thereof into one act,' being chapter 26 of the private acts of 1869 and 1870, also chapter 47, to the public acts of 1873, entitled 'An Act to amend the charters of all incorporated towns and cities in the State,' passed March 18, 1873; also, an act entitled 'An Act to incorporate the town of Memphis,' passed Dec. 9, 1826; also, an act entitled 'An Act to extend the limits of the corporation of the town of Memphis, and for other purposes,' passed Oct. 19, 1832; also, an act entitled 'An Act to amend the several acts incorporating the town of Memphis,' passed Dec. 7, 1843; also, an act entitled 'An Act to reduce the several acts incorporating the town of Memphis into one act, and to amend the same,' passed Jan. 11, 1848; also, an act entitled 'An Act to incorporate into one act the several acts incorporating the city of Memphis and the town of South Memphis,' passed Jan. 6, 1846, and Jan. 21, 1848, and to 'unite the said towns into one, and extend the boundaries thereof,' passed Dec. 3, 1849; also, the section of an act entitled 'An Act to amend an act entitled An Act to incorporate the town of Tazwell,' passed Jan. 2, 1830, passed Jan. 28, 1852; also, an act entitled 'An Act to amend the charter of the city of Memphis,' passed Feb. 29, 1856; also, an act entitled 'An Act to amend the charter of the city of Memphis, and for other purposes,' passed Feb. 20, 1860; also, an act entitled 'An Act to amend the charter of the city of Memphis,' passed Nov. 24, 1866; also, an act passed in amend-

ment of the foregoing acts, and also any other acts creating into a body politic and corporate the inhabitants of a certain territory lying within the county of Shelby, by the name of the City of Memphis, the Mayor and Aldermen of Memphis, or other corporate name whatever, or acts amending the said acts of incorporations be, and the same are hereby, each and every one of them, repealed, and all offices created and held under and by virtue of any of said acts are abolished.

"SECT. 2. That the charters and amendments thereof of all municipal corporations within the State, having a population of thirty-five thousand inhabitants or over, by the Federal census of 1870, be, and the same are hereby, repealed, and all municipal offices held under them are abolished.

"SECT. 3. That the charters and amendments thereof of all municipal corporations within this State having thirty-five thousand inhabitants or over, at the date of the passage of this act, be, and the same are hereby, repealed, and all municipal offices held thereunder are abolished. The governor of the State will ascertain and declare, by proclamation, to what corporations this section applies; said proclamation shall be conclusive evidence of its truth, and shall be made within ten days from the passage of this act.

"SECT. 4. That all of the sections, from section 33 to section 80, both inclusive, of an act entitled 'An Act to regulate and organize municipal corporations of certain population, and for the increase and diminution of their powers,' chapter 92, approved 23d March, 1875, and all other acts and parts of acts in conflict with this act, be, and the same are hereby, repealed; all the other sections of said chapter 92, and especially section 81 of said chapter, being left in full force; and the population within the territorial limits as now defined, and the territory of all municipal corporations heretofore governed under and by virtue of said repealed sections 33 to 80, inclusive, are hereby resolved back into the body of the State, and all offices held under and by virtue of said repealed sections are hereby abolished; and all power of taxation, in any form whatever, heretofore vested in or exercised by the authorities of said municipal corporations by virtue of any of the acts of incorporation hereinbefore recited, or otherwise, is for ever withdrawn and reserved to the legislature; and the public buildings, squares, promenades, wharves, streets, alleys, parks, fire-engines, hose and carriages, horses and wagons, engine-houses, engineer instruments, and all other property, real and personal, hitherto used by such corporations for municipal purposes, are hereby transferred to the custody and con-

trol of the State, to remain public property, as it has always been, for the uses to which said property has been hitherto applied. And no person holding office under and by virtue of any of said repealed sections, or any of the acts above recited, shall, from and after the passage of this act, exercise or attempt to exercise any of the powers or functions of said office.

"SECT. 5. That this act take effect from and after its passage, the public welfare requiring it.

"Passed Jan. 29, 1879. Approved Jan. 31, 1879."

"CHAPTER 11, ACTS OF 1879.

"*A Bill to establish Taxing Districts in this State, and to provide the Means of Local Government for the same.*

"SECT. 1. That the several communities embraced in the territorial limits of all such municipal corporations in this State as have had or may have their charters abolished, or as may surrender the same under the provisions of this act, are hereby created taxing districts, in order to provide the means of local government for the peace, safety, and general welfare of such districts.

"SECT. 2. That the necessary taxes for the support of the governments thus established shall be imposed directly by the General Assembly of the State of Tennessee, and not otherwise. In administering the affairs, and for providing the means of local government in said districts, the following agencies and governing instrumentalities are hereby established: —

"1st, A board of fire and police commissioners, to be selected and qualified in the manner hereafter provided.

"2d, A committee on ordinances or local laws, to be known as the 'Legislative Council of the Taxing District,' and which shall consist of the commissioners of the fire and police board, and the supervisors of the board of public works.

"3d, A board of health, to consist of the chief of police, a health officer, and one physician who shall have been in active practice for the period of five years next preceding his appointment, who shall be an inhabitant of the taxing district, and for five years a resident of the county, and who shall be *ex officio* president of the board.

"4th, A board of public works, to consist of five supervisors of public works, three of whom shall be chosen by the qualified voters of the people of the taxing district, and two appointed as hereinafter provided, and shall serve for a term of two years.

. . . . . .

"SECT. 11. That the diversion of any portion of any of said taxes, or wharfage dues, or other funds, from the purpose for which they were levied, by any of the commissioners, or by the trustee, shall be a felony, for which the guilty party upon conviction shall suffer imprisonment in the Penitentiary at hard labor for two years.

"SECT. 12. That said commissioners shall not issue any bonds, notes, script, or other evidences of indebtedness, and shall in no event contract for work, or material, or services, in excess of the amount of tax levied for such work, material, or service for that year, and parties contracting with said commissioners for work, material, or services shall look alone to the tax for that purpose for that year, and no subsequent tax shall be levied to meet the deficit, and no property, real or personal, held by said commissioners for public use, shall ever be subject to execution or attachment, or seizure under any legal process, for any debt created by said commissioners, and all taxes due, or moneys in the hands of the county trustee, or on deposit, shall be exempt from seizure under attachment, execution, garnishment, or other legal process. And said commissioners and said trustee and other governing agencies employed by this act are expressly prohibited from levying any taxes for any purpose, that power being reserved to the legislature, and no writ of *mandamus* or other process shall lie to compel them to levy any taxes; nor shall the said commissioners or said trustee, nor the local government created by this act, pay or be liable for any debt created by said extinct corporation, nor shall any of the taxes collected under this act ever be used for the payment of any of said debts.

. . . . . .

"SECT. 14. That the fire-engines, hose and carriages, horses and wagons, engine-houses, public buildings, public squares, parks, promenades, wharves, streets, alleys, engineer instruments, and all other property, real and personal, hitherto used by such corporations for purposes of government, are hereby transferred to the custody and control of said board of commissioners, to remain public property, as it has always been, for the uses to which said property has been hitherto applied, and that all indebtedness for taxes or otherwise, whether in litigation or otherwise, due to the said municipalities, shall vest in and become the property of the State, to be disposed for the settlement of the debts of said extinct municipalities as shall be hereafter provided by law, and all suits now pending shall be prosecuted to final determination under the provisions

of this act, without change of parties, and suits brought by said taxing districts shall be brought in the name of the president of fire and police commissioners: *Provided, however*, that the taxes heretofore assessed as privilege taxes, and set apart for the payment of the police and firemen, shall be paid out as collected, under the provision of this act, to the said police and firemen.

. . . . . .

"SECT. 25. That this act shall take effect from and after its passage.

"Passed Jan. 29, 1879. Approved Jan. 31, 1879."

On February 7 the complainants, by leave of the court, filed an amended and supplemental bill, to which the City of Memphis, John R. Flippin, mayor of the city, and W. J. Chase, W. Hewitt, Jamer Elder, Simon Green, H. G. Dent, Marcus Jones, W. H. Brown, J. W. Moores, W. Benjes, George Haesinger, composing the board of aldermen of Memphis, James Bohan, D. T. Goodyear, W. P. Proudfit, Charles Quentel, Sen., J. H. Surdam, J. H. White, W. H. Bates, M. Selig, L. L. Lawhorn, P. O. Wood, Andrew Renkert, Herman Caro, Thomas Boyle, Peter Tracey, W. J. Crosbie, W. O. Harvey, Thomas Barrett, P. M. Patterson, L. D. Grant, William Bradford, composing the board of common councilmen of the city, altogether constituting the general council of the city, and as trustees and representatives of the corporators; also George B. Fleece, trustee of Shelby County, Tennessee, and *ex officio* tax-collector of the city, the German National Bank of Memphis, J. W. Moores, former tax-collector of the city, and Joseph Uhl, clerk of the Circuit Court of Shelby County, Tennessee, all residents and citizens of that county, — were made defendants. The bill, after reaffirming the averments of the original bill, charges, among other things, that the complainants, as creditors of the corporation and having valid debts against it, are not and cannot be deprived of the vested rights secured to them by previous legislation; that said chapters 10 and 11 of the acts of 1879, so far as they attempt to impair those rights or divert the assets of the corporation from the reach or control of its creditors, are unconstitutional and void. The bill, after charging that upon the passage of said chapters 10 and 11 the mayor and other officers of the city who

were charged by law with the collection of taxes, and who held the same in trust to be applied in satisfaction of the complainants' debts, abandoned their offices and trusts and left the latter unexecuted; that before the repeal of the charter of the city there was in the hands of certain of the defendants a large amount belonging to the special trust and *mandamus* funds: and that all the property of the city, real and personal, including past-due and unpaid taxes, constitutes assets for the benefit of her creditors which should be brought in and marshalled for the payment of her debts, — prays that it may be taken and considered as a general creditor's bill for all who may come in within a time to be limited, and that a receiver be appointed and empowered and directed to take charge of all the tax books and papers of the city, and her records and books of every description, together with all the tax-books, bills and accounts for all taxes theretofore levied by her for all purposes which have not been collected and are yet due and unpaid; that he be empowered to collect the same by distress-warrants, or in any manner deemed expedient by the court, and bring or prosecute any suit or suits in any court for the collection of the same; that, until the rights of all persons be determined, he be instructed and required to keep separate accounts of each class of taxes collected as appear on the various tax-books of the city; that he be empowered to take charge of all money now on hand which has been collected from any source for taxes, rents, or otherwise; that all parties be required to pay the said funds to him, of which he shall keep separate accounts, and pay the same out to the parties entitled under the order of the court; that he be directed to take charge of all the real estate of the city of whatever description and wherever situated in which she has any interest, equitable or legal; that he take possession of all the personal property of every kind belonging to the city at the time of her dissolution, but that, for the time being and until the rights of parties shall have been determined and some arrangements be made, the fire-engines, hose and horses, and paraphernalia of the fire department be not interfered with so as to destroy or impair its efficiency; that when the assets are collected they be disbursed under the order of the court to the parties to

whom they belong in law, or as the different parties are entitled; that he be empowered to sell any part of said assets from time to time, or all of the same, together with such further powers and instructions as may from time to time be necessary to bring other parties before the court; that, if the present assets are not sufficient to pay all the debts, assessments be made upon all the corporators and property in the city for any claims that may remain unpaid of said debts, whether due or not, and that judgments be rendered against said parties for amounts found due; that such accounts be taken to ascertain the amounts of debts as may be deemed expedient, and complainants' debts paid.

Jan. 30, 1879, Hopkins Loudon filed his bill against the city of Memphis to recover money due for laying pavements. On February 6 he filed an amended bill, averring that since filing his original bill he had recovered a judgment for the amount of his claim.

Bills were filed by other judgment creditors of the city, as follows: —

February 3, by the Ahrens Manufacturing Company against George B. Fleece, trustee of Shelby County, D. T. Goodyear, president of the common council and *ex officio* mayor, J. C. Neely, city treasurer, and James A. Newsom, city comptroller.

February 7, by Tallmadge E. Brown against the city of Memphis, John R. Flippin, its former mayor, Marcus Jones, the president of the board of aldermen, D. T. Goodyear, the chairman of the common council, James C. Neely, former city treasurer, the German National Bank, the First National Bank, the State National Bank, Joseph Uhl, clerk of the Circuit Court of Shelby County, George B. Fleece, county trustee of Shelby County, Benjamin F. Coleman, and James W. Moores, all citizens and residents of Shelby County.

February 10, by Fairman Rogers and others against the city, said Flippin, Jones, Goodyear, Neely, James A. Newsom, late comptroller, James H. Humphreys, late city engineer, Michael McFadden, late chief of the fire department, W. A. McCloy, late city register, James W. Moores, late back-tax collector, Joseph Uhl, clerk of the Circuit Court of Shelby County, George B. Fleece, county trustee of Shelby County,

the German National Bank, the State National Bank, and the First National Bank, John F. Frank and D. T. Porter, W. W. Guy and John Overton, Jr., styled the board of fire and police commissioners of the taxing district of Memphis, and against all other persons and corporations who have an interest in the subject-matter of the suit and might make themselves parties thereto.

February 12, the court ordered that the several causes be consolidated, and appointed T. J. Latham receiver. The order directs that he "first enter into a bond of the penal sum of fifty thousand dollars, with two or more securities, to be approved by the court, conditioned for the faithful performance of his duties as such receiver. He will also take an oath faithfully and impartially to discharge the duties of his said office. Such bond and oath shall be filed and remain of record in court here.

"After so qualifying, the said receiver will demand and receive and take possession of all the assets and property of the city of Memphis, including real and personal property and debts due to it, and taxes due and owing to it, except the taxes appearing on the tax-books for the year 1878, for which special provision is herein made, and except, also, the public highways of the city, the public squares, the public landings and wharves, the engine-houses, the fire-engines, and the horses belonging to the fire department, the hose, the hose-carriages, and the other property and appurtenances of the said department, the hospital, and the property and appurtenances belonging thereto or used in connection therewith, the horses, wagons, tools, and implements and other property used in connection with and necessary to the engineers' department of the city of Memphis, the property belonging to and used in connection with the police department of the city, and the taxes heretofore levied for the support of the public schools of the city; all which excepted articles and property are excluded from the operation of this order, and will not be taken possession of or interfered with by the said receiver until the further order of the court.

"The said receiver will also take possession of all the tax-books of the city of Memphis whereon unpaid taxes due it are

charged, except the tax-books for the year 1878, and the person or persons having the same in charge will at once, on his demand, surrender the same to him.

"He also will take possession and control of all the safes, books, papers, desks, office furniture, and other property belonging to the offices of mayor, comptroller, register, treasurer, tax-collector, inspector, city attorney, necessary to the discharge of his duties as receiver, and of the buildings wherein the general council of the city has heretofore assembled, and the property in or belonging to such buildings not previously herein excepted from the operation of this order, and the large safe in the mayor's office, and will safely keep the same, subject to the order of the court herein; and the person or persons having possession or control of the said property, or any part thereof, are hereby required to surrender the same to him on demand.

"And the said receiver will, as soon as he can conveniently, make and file a full and true inventory of all the property of every description which may come to his control or possession as such receiver.

"The defendant, George B. Fleece, as county trustee of Shelby County, from time to time as he collects taxes levied by the city of Memphis for the year 1878, except taxes levied for the support of the public schools, will at once pay over the sums he collects to the said receiver, in the lawful money of the United States, taking his receipt therefor, which shall be a protection and discharge to him for the sums so paid. He will also at once, on the demand of the said receiver, pay to him all the moneys he has on hand collected for and on account of taxes levied by the city of Memphis for the year 1878, except sums collected on account of taxes levied for the support of the public schools, and will take his receipt therefor, which shall be a protection and discharge for the amount so paid.

"The defendant, James C. Neely, as former city treasurer of the city of Memphis, and the German National Bank of Memphis, will at once, on the demand of the said receiver, turn over to him all the money in his hands or on deposit in the said bank received by him on the account of the city of Mem-

phis, except moneys received for taxes levied for the support of public schools, and take his receipt therefor, and such payment shall be a full acquittance and discharge for the sums so paid.

"The defendant, John R. Flippin, as late mayor of the city of Memphis, will, on demand of the said receiver, pay over to him any money and deliver to him any property he has belonging to the said city, except the large safe in the mayor's office, and the papers and vouchers not necessary for the receiver in the discharge of his duties, and take his receipt therefor, which shall be a complete acquittance and discharge for the sum so paid and the property so delivered.

"The defendant, Joseph Uhl, as clerk of the Circuit Court of Shelby County, will at once, on demand of the said receiver, pay over to him the money he has on hand received on the account of redemption of property sold for taxes due the said city, except such money as may have been received on account of taxes levied for the support of the public schools, and take his receipt therefor, which shall be an acquittance and discharge for the sum so paid, and he will hereafter from time to time, as he receives other moneys on the said account, pay over the same as aforesaid, with the exception aforesaid, to the said receiver, and take his receipt therefor, which shall be an acquittance and discharge for the sums so paid.

"The defendant, James W. Moores, will at once, on the demand of the said receiver, pay over to him any moneys in his hands received for or on account of taxes levied by the city of Memphis, except such sums as may have been received for taxes levied for the support of the public schools, and deliver him all the city tax-books in his hands, and take his receipt therefor, which shall be an acquittance and discharge for the sums so paid and for the said tax.

"The said receiver will at once proceed to ascertain what property, real and personal, other than that hereinbefore specified or mentioned in the bills herein, the city of Memphis owns, including such as it has become the owner of by purchases at sales for non-payment of taxes, and will take possession of such property where the possession is voluntarily surrendered, and report the same to the court, to the end that a proper disposition may be made thereof.

"In the meantime he is authorized to rent the property he may so obtain possession of from month to month, and to collect the rents, and hold the same subject to the order of the court. As soon as the said receiver is in possession of the funds already collected and on hand, and hereinbefore directed to be turned over to him, he will at once deposit the same in some solvent bank or banks in Memphis, to the credit of the clerk of this court, to be drawn out only by the order of this court, and report the same to the court, and in such report will show the amount received from each particular person on account of each particular tax, the year for which the same was levied, whether the tax on account of which the same has been paid was levied for the benefit of any particular person or persons or class of persons, and, if so, who such person or persons or class of persons are, and the proportions in which they are or claim to be entitled to share such fund or funds, and the amount thereof to which each one is or claims to be entitled.

"And, from time to time, as he hereafter receives other moneys under this order or as such receiver, he will in the manner above directed deposit the same, and on the first and third Mondays of each month the said receiver shall make and file with the clerk a report, similar to that required above, of the funds that may have been paid over to him. The said receiver, as soon as he receives the tax-books herein ordered to be delivered to him, will proceed in such manner as he may deem best to demand and collect all the unpaid taxes appearing on the said tax-books, levied by and due to the city of Memphis, in the lawful money of the United States, and keep a proper account of such collections, showing therein the particular tax or taxes from which each sum is derived, and the year for which the same was levied and the purpose for which levied.

"If he finds it necessary, the said receiver may bring actions at law or suits in equity against any party or parties owing any debt due to the city of Memphis, or any tax or taxes appearing on the said tax-books, for the recovery of the same, and in such actions or suits he may also proceed to enforce any specific lien or liens on any property, real or personal, for

the payment of such tax or taxes, and to have the same sold for the satisfaction thereof. He may also, in proper cases, employ the process of garnishment and all other proper process. He may bring the party or parties owing such tax or taxes by petition in this cause before this court, or he may sue at law in this court in proper cases.

"He may also, where he deems it best to do so, bring actions at law or suits in equity in the courts of the State, or make himself a party to any suit or suits already pending in such courts, where, by so doing, he may effect a collection of such tax or taxes, or any part thereof, and he is authorized to demand and receive and to receipt for all moneys heretofore collected, or which hereafter may be collected, on any judgment or decree heretofore rendered in favor of the city of Memphis, belonging to the said city, whether such judgment or decree is in this court or any other court of the United States, or any court of the State of Tennessee.

"He is hereby given authority to employ as many clerks and assistants as may be necessary to enable him to discharge the duties of his said office promptly and efficiently, who shall be paid a reasonable compensation out of the assets which may come to his hands, to be fixed hereafter by the court.

"The said receiver will make use of the building and offices formerly occupied for a city hall, and belonging to the city of Memphis, or such part thereof as may be necessary for his purposes, and will make use of such safes, desks, tables, chairs, and other furniture and property of the city of Memphis as he may have need of; but he will file in court here, as soon as he can conveniently make the same, a correct and full description and inventory of all the property he may use.

"The said receiver is hereby authorized to buy and pay for the necessary books and stationery, the necessary fuel and lights, and whatever else may be necessary property to fit his office or offices for use, and to enable him efficiently to discharge the duties imposed on him; but such expenditures shall always be subject to the control and approval or rejection of the court.

"The said receiver is also hereby authorized to insure any

property, real or personal, which may come to his hands as such receiver, where he deems it prudent to do so.

"The said receiver is also empowered to employ one or more attorneys, if necessary, to conduct the prosecution or defence of any suit or suits he may find it necessary to bring, prosecute, or defend, under the authority hereby conferred upon him. The compensation of such attorney or attorneys shall be fixed by the court hereafter, and shall be paid out of the assets which may come to the hands of the said receiver, in such manner as the court may direct.

"The several persons and corporations upon whom the process of garnishment have been served under the executions issued on the judgments of a portion of the plaintiffs in these suits, as appears by the bills herein, and who are parties hereto, are hereby directed to deliver or pay to the receiver herein appointed, on his demand as hereinbefore ordered, all the property, money, and effects in their hands or under their control, respectively, belonging to the city of Memphis, and upon their severally doing so they are hereby severally discharged as such garnishees.

"It is further ordered, that all persons having debts or claims of any character against the city of Memphis have leave to make themselves parties to these consolidated suits on or before the third Monday of May next, by severally filing petitions herein, setting forth their respective debts or claims, and that the clerk of this court at once give notice by publication in one of the daily morning papers published in Shelby County, for sixty days, that such persons are hereby required within the time aforesaid so to make themselves parties, and file their debts and claims."

By sect. 5 of chap. 84, acts of 1879, passed March 12, 1879, and approved March 13, 1879, sect. 14 of chap. 11 of the acts of that year was amended so as to read,—

"That the fire-engines, hose and carriages, horses and wagons, engine-houses, public buildings, public grounds, parks, promenades, wharves, streets, alleys, engineer's instruments, and all other property, real and personal, hitherto used by such corporations for purposes of government, are hereby transferred to the custody and control of said board of commissioners, to remain public property,

as it has always been, for the uses to which said property has hitherto been applied, and that all indebtedness for taxes or otherwise, whether in litigation or otherwise, due to the said municipalities, shall vest in and become the property of the State, to be disposed of for the settlement of the debts of said extinct municipalities, as shall be hereafter provided by law, and suits brought by said taxing districts shall be brought in the name of the President of the Board of Fire and Police Commissioners."

On March 13, 1879, the legislature passed the following act: —

"CHAPTER 92, OF ACTS OF 1879.

"*An Act to collect and dispose of the Taxes assessed for Municipal Corporations in this State whose Charters have been or may be repealed, or which may surrender their Charters, and to provide for the Compromise and make Settlement of the Debts of such Extinct Municipal Corporations respectively.*

"SECT. 1. Be it enacted by the General Assembly of the State of Tennessee, that as to municipal corporations in this State, whose charters may have been repealed at the time this act takes effect, and, from time to time, as the charters of other municipal corporations may be repealed or surrendered, the governor of the State shall appoint an officer for such extinct corporations respectively, to be known as a receiver and back-tax collector, who shall take the oath required of other collectors of public revenue, and shall give bond with good sureties, to be approved by the county court of the county in which the extinct corporation was situated, in such sum as the county court may prescribe; and it shall be the duty of the quarterly court, at each quarterly term thereof, to see that the bondsmen continue good and adequate for the full protection of all persons interested, and for that purpose, from time to time, to require further and additional sureties whenever such court deems the same necessary for the protection of those interested.

"SECT. 2. That such receiver and back-tax collector shall make to the Chancery Court every three months a full, clear, and complete statement, showing all taxes collected and settled, and all in his hands that remain to be collected and settled. He shall, at the end of each month, pay into the treasury of the State the whole sum by him collected, less his compensation. He shall distinguish, in making such payments, the respective sources from which the

moneys paid in are derived, showing what is collected from taxes for general purposes, and what for taxes for special purposes, designating the particular or special purpose, so that the same may be kept separate in the State treasury, in order that the treasurer may pay the same according to any lien, priority, or equity, if any, which may be declared by the Chancery Court touching any of said funds, in favor of any creditor or class of creditors.

"SECT. 3. That the back-tax collector and receiver shall, as soon as appointed, enter upon the duties of his office. It shall be his duty, and he is hereby empowered, to take possession of all books, papers, and documents pertaining to the assessment and collection of the taxes embraced by this act.

"SECT. 4. That, for the purpose of collecting the revenue embraced in the provisions of this act, the receiver and back-tax collector is empowered and authorized to file a general creditors' bill in the name of the State in behalf of all creditors against all the delinquent tax-payers who owed taxes to the extinct corporation at the time of the repeal or surrender of its charter, which bill shall be filed in the Chancery Court of the county in which such extinct corporation was situated. All the said delinquents in any one county shall be embraced in one subpœna to answer, and for the same the clerk shall receive a fee of five cents for each defendant named in the subpœna except for the first, and for that, the fee allowed in other cases: *Provided*, he shall not receive exceeding twenty-five dollars for such subpœna; and the sheriff, for serving the same, shall receive for each defendant ten cents, except the first, and for that, the fee allowed for like services in other cases. Publication for non-residents shall embrace in the same publication, if practicable, all non-resident defendants, — the object being to make one proceeding embrace the whole taxes of such extinct corporation. All pending suits are to be received in the name of the State, and consolidated with the general proceedings herein provided for, and, when so consolidated, to form part of said general proceeding. The court in which said proceeding may be instituted shall have power to settle and adjust all equities, priori ties, and liens, and to give all relief both to the defendants and the creditors that might be given if there were as many separate suits as there are creditors and delinquent tax-payers. Such court shall have power to enforce all liens upon property for the payment of such taxes, and to order and make all sales of property necessary to the collection of such taxes. The taxes embraced by this act, and which it provides for, are all taxes imposed by said extinct

municipalities up to the time of the repeal or surrender of their charter. The Chancery Court, in the exercise of the jurisdiction conferred by this act, shall have all the powers possessed by such courts in the administration of the estates of insolvent, natural, or corporate persons. If it shall appear that the taxes imposed in any case were excessive, the court shall have power to reduce the assessment so as to make it fair and just.

"SECT. 5. That back taxes imposed prior to the year 1875 may be settled in the valid indebtedness of such extinct municipalities, as provided by sect. 66 of an act passed March 20, 1875, entitled 'An Act to regulate and organize municipal corporations of certain population, and for the increase and diminution of their powers,' and, in addition to said act, as follows, to wit, in valid bonds, whether due or not, and due coupons, and any other valid debt of such municipality with accrued interest, whether in the shape of scrip, warrants, judgments, ledger balances, paving certificates, or receipts for money paid by back-tax payers to paving contractors, or to the said corporation for Nicholson or stone paving done under former laws and ordinances authorizing front foot assessments for paving, and the back-tax collector and receiver is hereby required to accept the same at the following rates, to wit, bonds known as compromise or funded bonds shall be received at their face value, all other bonds, scrip, certificates of indebtedness, past-due coupons, ledger balances, &c., shall be received at fifty cents on the dollar, or one-half their face value, and all judgments shall be received at fifty-five cents on the dollar of their face value: *Provided*, compromise bonds issued in lieu of any bonds which have been pronounced invalid by the Supreme Court of this State shall be excluded so far as such invalid bonds shall compose a part or the whole of such compromise bonds; and compromise bonds issued in whole or in part in lieu of bonds liable by implication, on account of over-issue or otherwise, to a similar decision of the Supreme Court, shall not be received, so far as they may be composed in whole or in part of such suspected bonds, until the validity of such suspected bonds shall be determined by the Supreme Court of the State, and the aforesaid bonds, coupons, scrip, &c., shall be received with interest added, if there be interest, in payment of taxes imposed prior to 1875, whether before or after judgment or decree against the delinquent tax-payers in satisfaction of such taxes, or by way of set-off against taxes due such extinct municipalities, whether acquired before or after suit brought against a delinquent tax-payer. But, before being required to accept the

same, such back-tax collector and receiver may, if he chooses, and if he suspect the debt not valid, or if any creditor gives him notice that it is not, then before taking it he shall, on motion in the general suit, have the question settled by the Chancellor whether such indebtedness is valid or not, and it shall be the duty of such receiver and back-tax collector to receive in payment of taxes imposed after 1874 any of the aforesaid valid indebtedness of the extinct municipality, when there is no lien or equity requiring the same to be paid in current money, and whenever any question may be raised as to the right of the tax-payer to pay taxes imposed after 1874 on the said indebtedness of the extinct municipality, the court shall determine the same on motion at the instance of the parties interested: *Provided, however*, that in every case where a bond of any kind or character, whether it be a compromise bond or other kind of bond, is received or taken up before maturity, all immatured interest coupons shall be surrendered with it, and no bond of any kind shall in any case be received before maturity which has the interest coupons detached, and nothing shall be allowed such immature coupons. All evidences of indebtedness taken by said receiver in payment of taxes shall be cancelled by him, as soon as the same comes into his hands, under the supervision of the Chancellor, and in such manner as he may order and decree.

"SECT. 6. That when collections shall be made, or taxes paid, as herein provided, or in current or in lawful money of the United States, it shall not be lawful for such receiver and back-tax collector to coerce payment of a greater sum than one-fifth part annually, so as to distribute the whole through five equal annual instalments. The said period of five years shall begin from the time of the appointment and qualification of the back-tax collector and receiver, and all costs of condemnations, penalties, and charges are hereby remitted, in all cases where taxes are collected under this act: *Provided, however*, that nothing herein contained is intended to interfere with any vested right which entitles the party having such right to a speedier collection, but only to extend the indulgence where the State has the power to do so without interfering with vested rights.

"SECT. 7. That funds collected under this act shall be paid out by the treasurer of the State, from time to time, to those entitled, in such manner as the Chancery Court may adjudge and decree, on the warrant of the receiver, countersigned by the Chancellor.

"SECT. 8. That the compensation of the back-tax collector and receiver of the extinct corporation of Memphis shall be two thou-

sand dollars per annum, but after two years the county court shall fix the salary of said officer, not to exceed two thousand dollars per annum, and of such other municipalities as this act may apply to, such sum as the quarterly court of the county may allow, in no case to exceed the sum that would be paid to the county trustee for like service.

"SECT. 9. That the receiver and back-tax collector shall have power to employ an assistant at a compensation not to exceed one hundred dollars per month during the time he is in actual service.

"SECT. 10. That publication shall make all creditors parties, with the right to relief as fully as if especially named, and they may at any time file with the clerk of the court their claims, or attested copies, retaining the original if they desire, subject to be produced, however, as the court may order, and placed in the custody of the clerk. The simple filing of said claims, respectively attested by the affidavit of the owner or his agent or attorney, shall be proof of such claims in common form, and, if not contested, entitle the same to payment *pro rata;* and for administering the oath in proving such claims in common form, and filing the same, the clerk shall receive the sum of ten cents, to be paid at the time of making the oath and filing the claim. If any creditor or the receiver and back-tax collector shall desire to contest the validity in whole or part of any claim filed in common form, he may do so in a summary way in the progress of the cause. The opposing parties in such contest shall reduce the facts to writing that are necessary to its determination, and file the same, and when filed they shall become part of the record, and the court shall have power, upon motion, and in a summary way, to hear and determine all questions of priority of payment in the progress of the cause. When any party is dissatisfied with the decision of any litigated question, he may have such question reheard upon appeal or writ of error in the Supreme Court, but so much of the record only as pertains to that particular litigation shall form the transcript and record for the appellate court, and the costs shall be paid by the parties to such appeal as the appellate court may direct, unless the receiver and back-tax collector is a party to the litigation on behalf of creditors generally, and in that case the costs may, if the appellate court think proper, be charged to the whole, or to some particular fund, as right and justice may require.

"SECT. 11. That nothing herein shall be construed to prejudice the right of redemption now allowed by law to any person for redeeming land hitherto sold for taxes, or that may hereafter be

sold under the provisions of this act; and as to all lands within the limits of such extinct municipalities heretofore sold for taxes and bid off in the name of the State or the city, the former, or their heirs or vendees, shall have five years from and after the passage of this act within which to redeem the same, but until such redemption such property shall be and remain the property of the State, and the owners, their heirs or vendees, shall alone have the right to redeem.

"SECT. 12. That it is the duty of the Attorney-General of the district wherein is situated the taxing district, as provided for in the act aforesaid, and they are hereby required immediately to suggest of record in all the courts of this State, and of the United States, where suits are pending against said municipalities, the repeal of the charters of the same.

"SECT. 13. That the proceedings in all suits now pending for the collection of taxes due such extinct municipalities shall be suspended until the filing of the general creditors' bill and the consolidation provided for in this act, and said general creditors' bill shall be prepared and filed by the receiver and back-tax collector as soon as practicable, and within six months from his appointment and qualification, and to enable him to prepare said bill he is authorized to employ, under the direction of the Chancellor, any cash funds that may come into his hands in obtaining any necessary abstracts of title.

"SECT. 14. That this act shall take effect from and after its passage, the public welfare requiring it.

"Approved March 14, 1879."

Pursuant to the provisions of said chapter 92, the Governor of Tennessee appointed Minor Meriwether to be receiver and back-tax collector. Thereupon the complainants, April 10, 1879, filed in the consolidated causes an amended and supplemental bill, to which Meriwether, William F. Hardin, Joseph R. Williams, and John B. Hill were, in addition to the persons mentioned in the original and amended bills, made defendants. This bill, after stating the filing of the original and amended bills by the various complainants, alleging the contents thereof, the failure of the defendants to either plead, answer, or de mur thereto, the appointment of Latham as receiver, the execution of his bond, and his entry upon the duties of that office, and charging that said Meriwether, as receiver and back-tax

collector, is interfering with said Latham as receiver of the court, and is impeding him in the collection of back taxes, and discouraging and preventing payments to him; that the defendants, Hardin, Williams, and Hill, who are citizens of and residents in the city of Memphis, although indebted to it for taxes long overdue and unpaid, refuse to pay them to said Latham as receiver, — prays that an injunction may issue restraining said Meriwether, his agents and attorneys, and each of them, from demanding, taking possession of, recovering, collecting or attempting to collect, or in any way interfering with the assets and property, real, personal, or mixed, or choses in action, of the city of Memphis, including the debts due to her, taxes of every description heretofore assessed and levied by or for her, and the evidences of such assets, property, debts, and taxes, consisting of deeds, bonds, bills, notes, accounts, books of assessment, tax-books and other books, and writings of every description, having reference to such property, assets, debts, taxes, or any part thereof; and from instituting or prosecuting any suits or actions of any kind whatever in any court against the said Latham, as such receiver as aforesaid, or against any other person or persons, for the recovery of any part of the assets or property, debts, taxes aforesaid, or any tax-books, assessment-books, or other books or writings of any kind having connection therewith or reference thereto or to any part thereof; and from doing any act or thing, and from making or publishing in any manner whatsoever any declaration or notice, printed, written, or verbal, asserting or tending to assert that the right to the property or custody or control of the said assets or debts or taxes of the city of Memphis, or property of any kind thereof, or to collect or receive the same, is rightfully in him, the said Meriwether, or is not in the said Latham, as such receiver, or tending to persuade or advise, prevent, hinder, or deter the persons owing debts or taxes to the city of Memphis from paying the same to the said Latham, as such receiver; that an account may be taken as to the amount of taxes or debts due from each and every of the said defendants, Hardin, Williams, and Hill, and the particular lot or lots of land upon which the said taxes were assessed and levied, and upon which they constitute a lien, and the

amount due and owing by them to the city of Memphis on account of past-due taxes or on any other account; that the complainants may be subrogated to all the rights, claims, and liens of the said city of Memphis against the said defendants severally; and that the lien which the said defendant, the city of Memphis, held or holds against or on the several lots and parcels of land aforesaid, on account of said taxes assessed and levied thereon, may be declared and fixed by decree for the benefit of the complainants and other creditors in like attitude, and that personal decrees be also rendered against each of said defendants for the amount found due from them on the taking of the said accounts for the benefit of complainants; and that unless said defendants shall severally pay into the registry of this court by a day fixed the amounts so found due from them on the claims aforesaid, that then the court decree that said several parcels or lots of land be sold to satisfy the amounts so found due on account of each as liens thereon, and in order that all equity of redemption or repurchase shall be cut off and for ever barred; that the said lots be sold on a credit of seven months, and barring all right of redemption, and the proceeds when realized be applied to the payment of the complainants' claims herein, and other creditors in like attitude who may come in and be made parties hereto.

The defendants demurred, setting up sundry grounds therefor. The judges, upon consideration of the matters thereon arising, were divided in opinion upon the following questions: —

1st, Whether, inasmuch as the first of the original bills filed in these consolidated cases was filed in this court prior to the 29th of January, 1879, the date of the act of the General Assembly of the State of Tennessee repealing the charter of the city of Memphis, this court had or has any jurisdiction to seize and impound the assets, revenues, and properties of the corporation in being, described in complainants' bill, and to place those assets, revenues, and properties in the hands of a receiver appointed by the court to collect, administer, and disburse the same in the payment of creditors of such corporation.

2d, Whether the act of the General Assembly of the State of Tennessee, entitled "An Act to repeal the charters of certain municipal corporations, and to remand the territory and the inhabitants thereof to the government of the State," passed Jan. 29, 1879, and approved Jan. 31, 1879, and which act in terms, as shown therein, repealed the charter and all laws incorporating the city of Memphis, was and is a valid law, or whether the said act is contrary to the Constitution of the State of Tennessee or to the Constitution of the United States, as against creditors holding bonds and debts contracted prior to the repeal.

3d, Whether this court has jurisdiction to seize and impound and administer the assets, properties, and revenues of said municipal corporation, when it appears that the mayor and other officers of said municipal corporation have abandoned their offices and duties, and where it also appears that the General Assembly of the State has passed a series of these acts, one repealing the charter of Memphis; the second, creating a taxing district in the same territory and providing a government therefor; and the third, to collect and dispose of the taxes assessed for municipal corporations in this State, &c., being chaps. 10, 11, and 92 of the acts of 1879.

4th, Whether, if the act of the General Assembly repealing the charter of the city of Memphis be valid, the effect thereof was to extinguish all claims, debts, dues, and demands to and from said municipal corporation, including the claims of the various complainants in these causes.

5th, Whether, if said act repealing the charter be declared valid, and that the effect thereof was not to extinguish all claims, debts, dues, demands to and from said municipal corporation, this court has jurisdiction to collect the taxes which had been lawfully assessed by said municipal corporation and due before the repeal of its charter, but which have not been collected.

6th, Whether, if this court has jurisdiction to collect back or delinquent taxes, it can do so by directing its receiver to sue the delinquent tax-payers, and if so, in what court, State or Federal, must such suits be brought, or can the court, by proceeding in the nature of garnishment, require the delinquent

tax-payers to come before the court and pronounce judgment against each for the amount found to be due.

7th, Whether this court has jurisdiction to enforce the lien on real estate for taxes which the said municipal corporation possessed by proceeding in these causes or otherwise.

8th, Whether upon the entire record this court has jurisdiction to entertain the bills and grant any relief to the complainants.

9th, Whether after the taxes already levied and uncollected, due said corporation, and the other property named in these bills, shall have been ascertained to be insufficient to pay all the creditors of said city, that then this court has power to bring in all or any part of the inhabitants and corporators within the limits of said dissolved corporation by process, and make assessment against them or their property to pay the balance of entire debt found owing from said corporation *pro rata*, and render judgments and decrees against each of them for the *pro rata* share or amount found due from said dissolved corporation, and enforce liens against specific property against which taxes shall have been levied.

10th, Whether where the charter of a municipal corporation has been repealed the creditors of such municipal corporation have a right to any relief, except such as the State, through and by its legislative enactments, may afford to such creditors.

13th, Whether the fourth section of the act of the legislature of the State of Tennessee, approved Jan. 31, 1879, chapter 10, acts 1879, repealing the charter of the city of Memphis, and the fourteenth section of an act of the said legislature, approved on the thirty-first day of January, 1879, being chapter 11 of the acts of said State for 1879, and act of the said legislature, approved March 13, 1879, being chapter 92 of the acts of said legislature of 1879, and particularly sections 4, 5, 6, 7, 11, and 13 of said act, as far as complainants are concerned, and the creditors who have made themselves parties, and the receiver of this court who was appointed before said act was passed, are in violation of the Constitution of the United States and of the Constitution of the State of Tennessee, and void.

The presiding judge being of opinion that the demurrers

were not well taken, they were overruled, whereupon, the defendants electing to abide thereby, the court, May 28, 1879, decreed that the complainants, and the other creditors who had made themselves parties under the leave of the court, and such others as might so make themselves parties, do have and recover of and from the city of Memphis the several debts due them respectively, the amounts of which would be fixed by the court, and that all the assets and property of every description theretofore belonging to the city of Memphis, or so much thereof as may be necessary for the purpose, including taxes heretofore assessed and remaining unpaid and due the city, be applied to the payment of such debts; to which end said Latham, as receiver, was directed to retain possession of all the assets and property, books, papers, and writings, placed in his hands to be disposed of only as the court might order in the progress of the suit, and that he collect the said assets and property in the manner directed by the former orders for the payment of the said debts. The court further decreed that the defendant, Minor Meriwether, as receiver and tax-collector, be perpetually enjoined from taking possession of, collecting, or attempting to collect, suing for, or in any way interfering with, said assets, property, books, papers, and writings, so in the possession of or to be collected by said Latham as such receiver; that all the property within the limits of the territory of the city of Memphis is liable and may be subjected to the payment of all the debts aforesaid owing by said city, and that such liability shall be enforced thereafter from time to time in such manner as the court might order and direct; that Latham, the receiver aforesaid, recover of the defendant Williams the sum of $6,843.46, of the defendant Hardin the sum of $954.85, and of the defendant Hill the sum of $6,638.38, being the amount of taxes due by them respectively to the city of Memphis; that executions issue on the said several decrees, the right being reserved to enforce all liens that might exist on any and all property for the payment of the said sums or any part thereof.

Meriwether and the other defendants then appealed here.

Mr. Joseph B. Heiskell, *Mr. George Davitt*, and *Mr. Minor Meriwether* for the appellants.

Mr. William M. Randolph, *contra.*

MR. CHIEF JUSTICE WAITE announced the conclusions reached by the court as follows: —

1. Property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing-places, fire-engines, hose and hose-carriages, engine-houses, engineering instruments, and generally everything held for governmental purposes, cannot be subjected to the payment of the debts of the city. Its public character forbids such an appropriation. Upon the repeal of the charter of the city, such property passed under the immediate control of the State, the power once delegated to the city in that behalf having been withdrawn.

2. The private property of individuals within the limits of the territory of the city cannot be subjected to the payment of the debts of the city, except through taxation. The doctrine of some of the States, that such property can be reached directly on execution against the municipality, has not been generally accepted.

3. The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature.

4. Taxes levied according to law before the repeal of the charter, other than such as were levied in obedience to the special requirement of contracts entered into under the authority of law, and such as were levied under judicial direction for the payment of judgments recovered against the city, cannot be collected through the instrumentality of a court of chancery at the instance of the creditors of the city. Such taxes can only be collected under authority from the legislature. If no such authority exists, the remedy is by appeal to the legislature, which alone can grant relief. Whether taxes levied in obedience to contract obligations, or under judicial direction, can be collected through a receiver appointed by a court of chancery, if there be no public officer charged with authority from the legislature to perform that duty, is not decided, as the case does not require it.

5. The receiver and back-tax collector appointed under the authority of the act of March 13, 1879, is a public officer, clothed with authority from the legislature for the collection of the taxes levied before the repeal of the charter. The funds

collected by him from taxes levied under judicial direction cannot be appropriated to any other uses than those for which they were raised. He, as well as any other agent of the State charged with the duty of their collection, can be compelled by appropriate judicial orders to proceed with the collection of such taxes by sale of property or by suit or in any other way authorized by law, and to apply the proceeds upon the judgments.

6. The bills in this case cannot be amended so as to obtain relief against the receiver and back-tax collector, without making an entirely new suit. They were not framed with a view to any such purpose.

7. The decree of the court below is reversed.

8. The cause is remanded, with instructions to dismiss the bills, without prejudice. If, on the settlement of the accounts of the receiver herein, it shall be found he has any money in his hands collected on taxes levied under judicial direction to pay judgments in favor of any persons who have become parties to this suit, an order may be made directing its appropriation to the payment of such judgment.

Upon the first, second, third, and fifth of these propositions the judgment of the court is unanimous. Upon the fourth, sixth, seventh, and eighth it is by a majority only.

MR. JUSTICE FIELD delivered the following opinion for himself, MR. JUSTICE MILLER, and MR. JUSTICE BRADLEY.

Mr. Justice Miller, Mr. Justice Bradley, and myself concur in the judgment rendered, but, as the judgment is not accompanied by a statement of the reasons on which it is founded, I proceed to state those which have controlled us.

In January, 1879, the city of Memphis, in the State of Tennessee, was financially in a bad condition. She had been for many years a municipal corporation, and was invested with the ordinary powers of such bodies to make contracts and incur obligations for municipal purposes, and to levy and collect taxes to meet her expenditures. Her authorities were also at different times specially empowered by the legislature of the State to subscribe for stock in railroad corporations, to aid in the construction of lines of railway leading to and from

the city, and to issue interest-bearing bonds for the amount subscribed; also to issue bonds of like character to raise the means to erect water-works, construct pavements, and make "any public improvements" that might be necessary, and to acquire property for the public use of the city. Indeed, the powers conferred at various times upon the authorities to undertake public works, and engage in enterprises for the benefit of the city, were as large as the supposed necessities of a municipality with great expectations of future growth could suggest; and these powers appear to have been exercised with a liberality proportionate to the expectations. Taxes were levied to meet the consequent expenditures of the city and the interest on her bonds, but these were not always enforced with the readiness with which the obligations were incurred.

The record shows that for several years preceding 1879 not more than three-fifths of the annual taxes were collected. Whether this arose from the viciousness of the system of taxation adopted, or the inefficiency of the officers of collection, is immaterial. Probably it arose partly from both causes. The natural result followed: the revenues received became insufficient to meet the just claims of creditors; obligations were not paid as they matured; coupons for interest on bonds were not provided for; the city was in default for much of the principal and all of the interest of her indebtedness: she was insolvent. Suits were soon commenced against her by creditors: some in the Federal courts, some in the State courts; and from the Federal courts in several cases a *mandamus* was issued to the authorities of the city to levy a special tax for the payment of judgments recovered. With taxes uncollected, debts maturing, and both principal and interest unprovided for; with numerous suits commenced and more threatened; with credit gone and the property of her citizens already subjected to burdens difficult to be borne, — the city was in a condition out of which she was almost helpless to extricate herself.

While the city was thus burdened with debts and pursued by creditors, the State interfered; and on the 29th of January, 1879, repealed the charter of the city, took the immediate con-

trol and custody of her public property, and afterwards assumed the collection of the taxes levied, and their application to the payment of her indebtedness.

The repealing act was in terms general, and applied to all municipal corporations in the State having thirty-five thousand inhabitants at the date of its passage, to be ascertained by the governor, and declared by his proclamation. The city of Memphis had that number of inhabitants; and it was so proclaimed by the governor. The act not only repealed the charters of all such corporations, with their amendments, but declared that all municipal offices, held under them, were abolished; that the population within their territorial limits were resolved back into the body of the State; that all power of taxation in any form previously invested in their authorities was withdrawn and reserved to the legislature; and that the public buildings, squares, promenades, wharves, streets, alleys, parks, fire-engines, hose and carriages, engine-houses, engineer instruments, and all other property, real and personal, previously used for municipal purposes, were transferred to the custody and control of the State, to remain public property as previously it always had been.

On the same day with the passage of the repealing act, the legislature passed another act to establish taxing districts in the State, and to provide the means for their local government. It declared that the several communities embraced in the territorial limits of the repealed corporations, and of such other corporations as might surrender their charters under the act, were created taxing districts in order to provide the means of local government for their peace, safety, and general welfare; that the necessary taxes for the support of the governments thus established should be imposed directly by the General Assembly, and not otherwise; that in administering the affairs and providing the means of local government the following agencies and instrumentalities were established, — namely, a board of fire and police commissioners; a committee on ordinances or local laws, to be known as the legislative council of the taxing district; a board of health, and a board of public works; and it prescribed in detail the duties and powers of these local agencies. The act prohibited the

commissioners from issuing any bonds, notes, scrip, or other evidences of indebtedness, or from contracting for work, material, or services in excess of the amount levied for them for that year; and declared that no property, real or personal, held by them for public use should ever be subject to execution, attachment, or seizure under any legal process for any debt created by them; that all taxes due, or moneys in the hands of the county trustee, or on deposit, should be exempt from seizure under attachment, execution, garnishment, or other legal process. It also declared that no writ of *mandamus* or other process should lie to compel them or other governing agencies to levy any taxes, and that neither the commissioners, nor trustee, nor the local government should be held to pay or be liable for any debt created by the extinct corporations, and that none of the taxes collected under the act should ever be used for the payment of any of said debts. The act also declared that all the property previously used by the corporations for purposes of government was transferred to the custody and control of the board of commissioners of the taxing districts, to remain public property for the uses to which it had previously been applied, and that all indebtedness for taxes or otherwise, whether in litigation or not, due to the extinct municipalities, should vest in and become the property of the State, to be disposed of for the settlement of their debts as should thereafter be provided by law.

On the 13th of March following such provision was made. By an act passed by the legislature on that day, the governor was directed to appoint an officer for municipal corporations, whose charters had been repealed under the first act mentioned, or might be subsequently surrendered, to be known as a receiver and back-tax collector. It required him to take possession of all books, papers, and documents pertaining to the assessment and collection of taxes, which had been levied at the time of the repeal of the charters. It ordered him to file a bill in the Chancery Court of the county in which the corporation was situated, in the name of the State, in behalf of all creditors against all its delinquent tax-payers, and provided that taxes assessed prior to 1875 might be settled in the valid indebtedness of the extinct municipality, whether due or

not, and that the receiver should receive evidences of such indebtedness at certain designated rates. It also prohibited him from coercing payment of a greater sum than one-fifth of the taxes in arrears annually, so as to distribute the whole through five equal annual instalments, commencing from his appointment and qualification. It authorized the Chancery Court to enforce all liens upon property for the payment of taxes, and to order all sales necessary for their collection; and to settle and adjust all equities, priorities, and liens; and to give to the defendants and creditors all the relief which might be given if there were as many separate suits as there were creditors and delinquent tax-payers. It provided that the taxes as collected should be paid into the State treasury, and be paid out to parties entitled to receive them, as adjudged by the Chancery Court, upon the warrant of the receiver, countersigned by the Chancellor. It required the receiver, in paying the money collected into the treasury, to distinguish the sources whence it was derived, showing the amount from each special and general tax, so that they might be kept separate, and be paid out to creditors according to the priority, lien, or equity determined. The act was accompanied with a proviso that it should not interfere with any vested rights entitling parties to a speedy collection. On the passage of the repealing act there was a large amount of uncollected taxes, which had been levied upon property in the city of Memphis, such as taxes to pay certain specified creditors under writs of *mandamus*, a special tax to pay interest upon bonds, a special sinking-fund tax, a school tax, a wharfage tax, a tax upon merchants to pay police and firemen, a tax to pay interest upon bonds issued to certain railroads, and a tax for general purposes of government. Under the provisions of the act of March 13, the defendant, Minor Meriwether, was appointed by the governor receiver and back-tax collector of that city. He accepted the appointment, and proceeded at once to the performance of his duties.

The day previous to the passage of the act repealing the charter of Memphis, and probably in anticipation of the contemplated legislation of the State, Robert Garrett and others, creditors of the corporation, filed a bill against the city, al-

leging in substance that the city owed them over $100,000, upon much of which they had recovered judgments and obtained writs of *mandamus* to compel the levy of taxes for their payment; that various writs of *mandamus* had been issued against the city for over $850,000; that through the malfeasance and incompetency of its officials only about three-fifths of the taxes imposed had been collected, and that this practice had run through a series of years, resulting in delinquent taxes of about $2,500,000; that the taxes levied, pursuant to the writs of *mandamus* issued, constituted a trust fund which could only be used for the payment of the judgments; that the city was a trustee for the same, and, although requested to press the collection, had neglected to do so, and that this neglect was a fraud on the complainants relievable in a court of equity.

It also set up that the legislature, by an act of the 19th of March, 1877, had authorized the Chancery Court of the State to appoint a receiver to take charge of the affairs of the city, upon application of creditors owning demands against her exceeding $100,000, when it was made to appear that writs of *mandamus* had been issued against her to enforce debts against the city amounting to over $850,000; and averring that the court had jurisdiction, both upon general principles of jurisprudence and by authority of that act, the bill prayed the appointment of a receiver to take charge of the assets of the city, including its tax-books and bills for unpaid taxes, and to collect the taxes levied, for the purpose of paying the judgments.

After the repealing act was passed, the complainants filed a supplementary bill setting up the passage of the act, alleging its invalidity, and repeating its prayer for the appointment of a receiver.

Subsequently several other parties instituted like suits against the city. All the suits were, in February, 1879, consolidated into one without objection, and by amendment to it, in April following, Meriwether, the receiver appointed by the governor, was made a defendant, as also sundry parties upon whose property taxes had been levied. With the consolidation a receiver of the assets and property of the city was appointed

to hold and dispose of the same under the direction of the court; and he immediately qualified, and proceeded to take possession, so far as practicable, of the property and assets, and to exercise the powers with which he was invested.

To the bill as consolidated and amended a demurrer was interposed by the defendants, upon which several questions arose, on which the judges of the Circuit Court were divided in opinion. The prevailing opinion of the presiding judge being against the demurrer, it was overruled, and the defendants electing to stand upon it, judgment final was rendered in favor of the complainants, from which the defendants have appealed to this court.

The receiver appointed by the court was invested with larger powers than probably any officer of a court was ever before intrusted with. He was required to demand, receive, and take possession of all the assets and property of the city of Memphis, including real and personal property, and debts due to it and taxes which had been previously levied, except the taxes appearing on the tax-books for the year 1878, for which special provision was made; and except, also, the public highways of the city, the public squares, the public landings and wharves, the hospital, and certain property used in connection with it, and property of the fire, engineer, and police departments, and the taxes levied for the support of the public schools, which excepted articles he was not to take possession of or interfere with until the further order of the court. It does not appear that the court entertained any doubt that it could at some future time place all this public property in the hands of its receiver, as its subsequent decree shows. The receiver was also required to take possession of all the tax-books of the city on which unpaid taxes were charged, except the tax-books for the year 1878; and also all the safes, books, papers, desks, office furniture, and other property belonging to the offices of mayor, comptroller, register, treasurer, tax-collector, inspector, and city attorney, necessary to the discharge of his duties as receiver, and of the buildings in which the general council of the city had previously assembled, and the property in and belonging to such buildings not previously excepted, and keep them subject to the order of the court; and parties

having possession or control of such property, or any part of it, were required to surrender the same to him on demand.

By the order appointing the receiver, the trustee of Shelby County, within which the city of Memphis is situated, was required to pay over to him all the moneys he had on hand collected for taxes levied by the city for the year 1878, except such as were levied for the support of public schools. The former treasurer of the city was also required, with the like exception, to turn over to the receiver, on demand, all the money in his hands or on deposit in the German National Bank, received for the city. The mayor of the city was also to pay over to him any money, and deliver to him any property, belonging to the city, and the papers and vouchers necessary for the discharge of the receiver's duties; and the clerk of the county of Shelby was also to pay over any moneys received by him on account of the redemption of property sold for taxes due the city. The receiver was also required to lease the property of which he might have possession from month to month, and to collect the rents and hold the same subject to the order of the court; and, if he found it necessary, he was authorized to bring actions at law or suits in equity against parties indebted to the city, or for any tax or taxes appearing on the tax-books, and to enforce any specific liens on the property, real or personal, for the payment of such taxes; and to employ as many clerks and assistants as he might deem necessary; to make use of the buildings and offices in the city hall, and of such safes, desks, tables, chairs, and other furniture and property of the city he might need; to buy and pay for necessary books, stationery, fuel, and lights, and whatever else might be necessary to fit his office or offices for use to enable him to discharge his duties; to insure any property, real or personal, which might come into his hands, when he thought prudent to do so; to employ one or more attorneys, if necessary, to conduct the prosecution or defence of suits that he might find necessary to bring or defend under the authority conferred by him. Other powers were also vested in the receiver, but what has already been said is enough to show the extraordinary character of those conferred and of the duties imposed upon him. He was, in fact, in-

vested with the administration of the financial affairs of the city, so far as might be necessary for the collection of taxes and debts and disposing of the property of the city to pay the claims of creditors. Executive and administrative functions were invested in him which, it has not been supposed, could adequately be performed by the same person in any government of a city properly conducted.

The decree adjudged that the complainants in the several suits, and other creditors who had made themselves parties by leave of the court, or who might thereafter make themselves parties, should recover from the city the several debts due them respectively, the amounts to be thereafter fixed by the court, and that all the assets and property of the city, "of every description," or so much thereof as might be necessary for that purpose, including taxes previously assessed and remaining unpaid and due the city, should be applied to the payment of their debts. The decree also adjudged that the receiver should retain possession of all the assets and property, books, papers, and writings previously placed in his hands to be disposed of as the court might order in the progress of the suit, and that he proceed to collect the assets and property in the manner directed by previous orders for the payment of the debts. It also enjoined the defendant, Minor Meriwether, the receiver and back-tax collector appointed by the governor of the State, from taking possession of, collecting, or attempting to collect, suing for, or in any way interfering with, the assets and property, books, papers, and writings in the possession of the receiver of the court. And the decree further adjudged that all the property within the limits of the territory of the city of Memphis was liable and might be subjected to the payment of all the debts of the city, and that such liability would be enforced thereafter, from time to time, in such manner as the court might direct.

This decree is manifestly erroneous in its main provisions. It proceeds upon the theory that the property of every description held by the municipality at the time of its extinction, whether held in its own right or for public uses, including also in that designation its uncollected taxes, were chargeable with the payment of its debts, and constituted a trust fund, of which

the Circuit Court would take possession and enforce the trust; and that the private property of the inhabitants of the city was also liable, and could be subjected by the Circuit Court to the payment of its debts. In both particulars the theory is radically wrong.

The right of the State to repeal the charter of Memphis cannot be questioned. Municipal corporations are mere instrumentalities of the State for the more convenient administration of local government. Their powers are such as the legislature may confer, and these may be enlarged, abridged, or entirely withdrawn at its pleasure. This is common learning, found in all adjudications on the subject of municipal bodies and repeated by text-writers. There is no contract between the State and the public that the charter of a city shall not be at all times subject to legislative control. All persons who deal with such bodies are conclusively presumed to act upon knowledge of the power of the legislature. There is no such thing as a vested right held by any individual in the grant of legislative power to them. *United States* v. *Railroad Co.*, 17 Wall. 322; *Commissioners* v. *Lucas, Treasurer*, 93 U. S. 108; *People* v. *Morris*, 13 Wend. (N. Y.) 325; *Philadelphia* v. *Fox*, 64 Pa. St. 169; *Montpelier* v. *East Montpelier*, 29 Vt. 12; Angell & Ames, Corp. (10th ed.), sect. 31; Dill. Mun. Corp., sect. 30; Cooley, Const. Lim. 192, 193. By the repeal the legislative powers previously possessed by the corporation of Memphis reverted to the State. A portion of them the State immediately vested in the new government of the taxing district, with many restrictions on the creation of indebtedness. A portion of them the State retained; it reserved to the legislature all power of taxation. It thus provided against future claims from the improvidence or recklessness of the new government. The power of the State to make this change of local government is incontrovertible. Its subsequent provision for the collection of the taxes of the corporation levied before the repeal of its charter, and the appropriation of the proceeds to the payment of its debts, remove from the measure any imputation that it was designed to enable the city to escape from its just liabilities.

But while the charter of a municipal corporation may be

repealed at the pleasure of the legislature, where there is no inhibition to its action in the Constitution of the State, the lawful contracts of the corporation, made whilst it was in existence, may be subsequently enforced against property held by it, in its own right, as hereafter described, at the time of the repeal. In this respect its position is not materially different from that of a private individual, whose property must, upon his decease, go to the satisfaction of his debts before those who succeed to his rights can share in its distribution. The language used by us in the case of *Broughton* v. *Pensacola* on this subject is quoted by counsel, under the impression that it tends to sustain the position of the complainants. We there said: —

"The ancient doctrine that, upon the repeal of a private corporation, its debts were extinguished, and its real property reverted to its grantors, and its personal property vested in the State, has been so far modified by modern adjudications that a court of equity will now lay hold of the property of a dissolved corporation, and administer it for the benefit of its creditors and stockholders. The obligation of contracts, made whilst the corporation was in existence, survives its dissolution, and the contracts may be enforced by a court of equity, so far as to subject, for their satisfaction, any property possessed by the corporation at the time. In the view of equity, its property constitutes a trust fund, pledged to the payment of the debts of creditors and stockholders; and if a municipal corporation, upon the surrender or extinction in other ways of its charter, is possessed of any property, a court of equity will equally take possession of it for the benefit of the creditors of the corporation." 93 U. S. 266, 268.

We approve of the doctrine stated in this citation. It expresses what we believe to be sound law. It means that whatever property a municipal corporation holds subject to the payment of its debts, will, after its dissolution, be so administered and applied by a court of equity. It does not undertake to determine what is to be deemed the property of a municipal corporation, which, after the extinction of its charter, is thus applicable. In the case from which it is taken, the bill alleged that the city of Pensacola, upon the surrender of its

charter, did not possess any property, and, of course, the question here raised could not have been before the court. The question there was as to the continuation of the city's liability under a new organization.

What, then, is the property of a municipal corporation, which, upon its dissolution, a court of equity will lay hold of and apply to the payment of its debts? We answer, first, that it is not property held by the corporation in trust for a private charity, for in such property the corporation possesses no interest for its own uses; and, secondly, that it is not property held in trust for the public, for of such property the corporation is the mere agent of the State. In its streets, wharves, cemeteries, hospitals, court-houses, and other public buildings, the corporation has no proprietary rights distinct from the trust for the public. It holds them for public use, and to no other use can they be appropriated without special legislative sanction. It would be a perversion of that trust to apply them to other uses. The courts can have nothing to do with them, unless appealed to on behalf of the public to prevent their diversion from the public use. The dissolution of the charter does not divest the trust so as to subject property of this kind to a liability from which it was previously exempt. Upon the dissolution, the property passes under the immediate control of the State, the agency of the corporation then ceasing. 2 Dillon, Mun. Corp., sects. 445, 446; *Schaffer* v. *Cadwallader*, 36 Pa. St. 126; *City of Davenport* v. *Peoria Marine & Fire Insurance Co.*, 17 Iowa, 276; *Askins* v. *Commonwealth*, 1 Duv. (Ky.) 275; *The President, &c.* v. *City of Indianapolis*, 12 Ind. 620.

In the third place, we say that taxes previously levied, but not collected on the dissolution of the corporation, do not constitute its property; and in the absence of statutory authority they cannot be subsequently collected by a court of equity through officers of its own appointment, and applied to the payment of the creditors of the corporation. Taxes are not debts. It was so held by this court in the case of *Oregon* v. *Lane County*, reported in 7th Wallace. Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the gov-

ernment, or for some special purpose authorized by it. The consent of the tax-payer is not necessary to their enforcement. They operate *in invitum*. Nor is their nature affected by the fact that in some States — and we believe in Tennessee — an action of debt may be instituted for their recovery. The form of procedure cannot change their character. *City of Augusta* v. *North*, 57 Me. 392; *City of Camden* v. *Allen*, 2 Dutch. (N. J.) 398; *Perry* v. *Washburn*, 20 Cal. 318. Nor are they different when levied under writs of *mandamus* for the payment of judgments, and when levied for the same purpose by statute. The levy in the one case is as much by legislative authority as in the other. The writs of *mandamus* only require the officers of assessment and collection to obey existing law. In neither case are the taxes liens upon property unless made so by statute. *Philadelphia* v. *Greble*, 38 Pa. St. 339; *Howell* v. *Philadelphia*, id. 471; 2 Dillon, Mun. Corp., sect. 659. Levied only by authority of the legislature, they can be altered, postponed, or released at its pleasure. A repeal of the law, under which a tax is levied, at any time before the tax is collected, generally puts an end to the tax, unless provision for its continuance is made in the repealing act, though the tax may be revived and enforced by subsequent legislation. We say generally, for there are some exceptions, where the tax provided is so connected with a contract, as the inducement for its execution, that the courts will hold the repeal of the law to be invalid as impairing the obligation of the contract. It is not of such taxes, constituting the consideration of contracts, that we are speaking, but of ordinary taxes authorized for the support of government, or to meet some special expenditure; and these, until collected, — being mere imposts of the government, created and continuing only by the will of the legislature, — have none of the elements of property which can be seized like debts by attachment or other judicial process and subjected to the payment of creditors of the dissolved corporation. They are in no proper sense of the term assets of the corporation. They are only the means provided for obtaining funds to support its government and pay its debts, and disappear as such means with the revocation of the charter, except as the legislature may otherwise provide. When they are collected, the moneys

in the hands of the collecting officer may be controlled by the process of the courts, and applied by their direction to the uses for which the taxes were levied; but until then there is nothing in existence but a law of the State imposing certain charges upon persons or property, which the legislature may change, postpone, or release, at any time before they are enforced. So long as the law authorizing the tax continues in force, the courts may, by *mandamus*, compel the officers empowered to levy it or charged with its collection, if unmindful and neglectful in the matter, to proceed and perform their duty; but when the law is gone, and the office of the collector abolished, there is nothing upon which the courts can act. The courts cannot continue in force the taxes levied, nor levy new taxes for the payment of the debts of the corporation. The levying of taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity, and the public welfare. In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare, and to provide the revenues for the support and due administration of the government throughout the State and in all its subdivisions. Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced.

It is the province of the courts to decide causes between parties, and, in so doing, to construe the Constitution and the statutes of the United States, and of the several States, and to declare the law, and, when their judgments are rendered, to enforce them by such remedies as legislation has prescribed, or as are allowed by the established practice. When they go beyond this, they go outside of their legitimate domain, and encroach upon the other departments of the government; and all will admit that a strict confinement of each department within its own proper sphere was designed by the founders of our government, and is essential to its successful administration.

This doctrine is not new in this court. It has been repeatedly asserted, after the most mature consideration. It was asserted in *Rees* v. *City of Watertown*. There the plaintiff, being the owner of certain bonds issued by the city of Watertown, in Wisconsin, to a railroad company, brought suit upon them in the Circuit Court of the United States, and recovered two judgments amounting to about $10,000. Upon these judgments he issued executions, which were returned unsatisfied. He then applied to the Circuit Court, and obtained a writ of *mandamus* upon the authorities of Watertown to levy and collect a tax upon the taxable property of the city to pay the judgments; but before the writs could be served a majority of the members of the council resigned their offices. Subsequent writs of *mandamus* obtained by him proved ineffectual, by reason of similar resignations. He then filed a bill alleging that the corporate authorities were trustees for the benefit of the creditors of the city; that the property of the citizens was a trust fund for the payment of its debts, and that it was the duty of the court to lay hold of such property and cause it to be applied; and he prayed that the court would subject the taxable property of the city to the payment of the judgments. To this bill the city made answer; and on the argument of the case, among other points, the question arose whether it was competent for the court, on the failure of the officers of the city to levy the tax as required by law, to appoint the marshal of the court to levy and collect the tax to pay the judgments. Upon this question, the judges being divided, the point was certified to this court. In disposing of it we said: "We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important." 19 Wall. 107, 116.

In the case of *Heine* v. *The Levee Commissioners of New Orleans*, the question again arose whether it was competent

for the Circuit Court of the United States to direct its officers to levy and collect a tax to pay the claims of the plaintiffs, who were holders of bonds issued by the commissioners; and the answer was equally emphatic both in the Circuit Court and in this court.

In the Circuit Court, over which Mr. Justice Bradley then presided, the possession of the power of taxation had been denied. "The judicial department," said the Justice, "has no power over the subject. If the officers who are charged with the duty of laying or collecting taxes refuse to perform their functions, the court, in a clear case of failure, and at the instance of a party directly interested, can, by the prerogative writ of *mandamus*, compel them to perform acts which are ministerial, as distinguished from those which are judicial or discretionary. This is all that the judicial department can do on the subject, unless the legislature has expressly conferred upon it further powers." 1 Woods, 247.

And when the case came before this court, we here said, Mr. Justice Miller delivering the opinion: "The power we are here asked to exercise is the very delicate one of taxation. This power belongs, in this country, to the legislative sovereignty, State or National. In the case before us the national sovereignty has nothing to do with it. The power must be derived from the legislature of the State. So far as the present case is concerned, the State has delegated the power to the levee commissioners. If that body has ceased to exist, the remedy is in the legislature, either to assess the tax by special statute, or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any Federal court. It is unreasonable to suppose that the legislature would ever select a Federal court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the Federal government of the legislative functions of the State government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee." 19 Wall. 655.

These authorities — and many others to the same purport

might be cited — are sufficient to support what we have said, that the power to levy taxes is one which belongs exclusively to the legislative department, and from that it necessarily follows that the regulation and control of all the agencies by which taxes are collected must belong to it.

When creditors are unable to obtain payment of their judgments against municipal bodies by execution, they can proceed by *mandamus* against the municipal authorities to compel them to levy the necessary tax for that purpose, if such authorities are clothed by the legislature with the taxing power, and such tax, when collected, cannot be diverted to other uses; but if those authorities possess no such power, or their offices have been abolished and the power withdrawn, the remedy of the creditors is by an appeal to the legislature, which alone can give them relief. No Federal court, either on its law or equity side, has any inherent jurisdiction to lay a tax for any purpose, or to enforce a tax already levied, except through the agencies provided by law. However urgent the appeal of creditors and the apparent hopelessness of their position without the aid of the Federal court, it cannot seize the power which belongs to the legislative department of the State and wield it in their behalf.

To return to the question propounded: what is the property of a municipal corporation which, on its dissolution, the courts can reach and apply to the payment of its debts?

We answer, it is the private property of the corporation, that is, such as it held in its own right for profit or as a source of revenue, not charged with any public trust or use, and funds in its possession unappropriated to any specific purpose. In this respect the position of the extinct corporation is not dissimilar to that of a deceased individual; it is only such property as is possessed, freed from any trust, general or special, which can go in liquidation of debts.

The decree of the Circuit Court proceeding upon a different theory of its control over the uncollected taxes of the repealed corporation, and of the property which could be applied to the payment of its debts, cannot be maintained.

On another ground, also, the decree is equally untenable. It adjudges that "all the property within the limits of the

territory of the city of Memphis is liable, and may be subjected to the payment of all the debts" for which the suits are brought, and that "such liability shall be enforced thereafter, from time to time, in such manner" as the court may direct.

In no State of the Union, outside of New England, does the doctrine obtain that the private property of individuals within the limits of a municipal corporation can be reached by its creditors, and subjected to the payment of their demands. In Massachusetts and Connecticut, and perhaps in other States in New England, the individual liability of the inhabitants of towns, parishes, and cities, for the debts of the latter, is maintained, and executions upon judgments issued against them can be enforced against the private property of the inhabitants. But this doctrine is admitted by the courts of those States to be peculiar to their jurisprudence, and an exception to the rule elsewhere prevailing. Elsewhere the private property of the inhabitants of a municipal body cannot be subjected to the payment of its debts, except by way of taxation; but taxes, as we have already said, can only be levied by legislative authority. The power of taxation is not one of the functions of the judiciary; and whatever authority the States may, under their constitutions, confer upon special tribunals of their own, the Federal courts cannot by reason of it take any additional powers which are not judicial.

In *Rees* v. *City of Watertown*, from which we have already quoted, the power asserted by the decree was claimed by counsel, but was rejected by the court. "Assume," said the court, "that the plaintiff is entitled to the payment of his judgment, and that the defendant neglects its duty in refusing to raise the amount by taxation, it does not follow that this court may order the amount to be made from the private estate of one of its citizens. This summary proceeding would involve a violation of the rights of the latter. He has never been heard in court. He has had no opportunity to establish a defence to the debt itself, or, if the judgment is valid, to show that his property is not liable to its payment. It is well settled that legislative exemptions from taxation are valid, that such exemptions may be perpetual in their duration, and that they are, in some cases, beyond legislative interference. The pro-

ceeding supposed would violate the fundamental principle contained in chapter twenty-ninth of Magna Charta, and embodied in the Constitution of the United States, that no man shall be deprived of his property without due process of law; that is, he must be served with notice of the proceeding, and have a day in court to make his defence." 19 Wall. 122.

It is pressed upon us with great earnestness by counsel, that unless the Federal courts come to the aid of the creditors of Memphis, and enforce, through their own officers, the taxes levied before the repeal of its charter, they will be remediless. But the conclusion does not follow. The taxes levied pursuant to writs of *mandamus* issued by the Circuit Court are still to be collected, the agency only for their collection being changed. The receiver appointed by the governor has taken the place of the collecting officers of the city. The funds received by him upon the special taxes thus levied cannot be appropriated to any other uses. The receiver, and any other agent of the State for the collection, can be compelled by the court, equally as the former collecting officers of the city, to proceed with the collection of such taxes by the sale of property or by suit, or in any other way authorized by law, and to apply the proceeds upon the judgments. If relief is not thus afforded to the creditors, they must appeal to the legislature. We cannot presume that the appeal will be in vain. We cannot say that on a proper representation they will not receive favorable action.

It is certainly of the highest importance to the people of every State that it should make provision, not merely for the payment of its own indebtedness, but for the payment of the indebtedness of its different municipalities. Hesitation to do this is weakness; refusal to do it is dishonor. Infidelity to engagements causes loss of character to the individual; it entails reproach upon the State.

The Federal judiciary has never failed, so far as it was in its power, to compel the performance of all lawful contracts, whether of the individual, or of the municipality, or of the State. It has unhesitatingly brushed aside all legislation of the State impairing their obligation. When a tax has been authorized by law to meet them, it has compelled the officers of assess-

ment to proceed and levy the tax, and the officers of collection to proceed and collect it, and apply the proceeds. In some instances, where the tax was the inducement and consideration of the contract, all attempts at its repeal have been held invalid. But this has been the limit of its power. It cannot make laws when the State refuses to pass them. It is itself but the servant of the law. If the State will not levy a tax, or provide for one, the Federal judiciary cannot assume the legislative power of the State and proceed to levy the tax. If the State has provided incompetent officers of collection, the Federal judiciary cannot remove them and put others more competent in their place. If the State appoints no officers of collection, the Federal judiciary cannot assume to itself that duty. It cannot take upon itself to supply the defects and omissions of State legislation. It would ill perform the duties assigned to it by assuming power properly belonging to the legislative department of the State.

MR. JUSTICE STRONG, with whom concurred MR. JUSTICE SWAYNE and MR. JUSTICE HARLAN, dissenting.

The several bills of the complainants were consolidated in the Circuit Court, and, so far as it appears, without objection. They are, therefore, to be considered as one case. The important facts averred in the bills and confessed by the demurrer are the following: —

The complainants are creditors of the city of Memphis. For a part of their claims they had recovered judgments against the city before the bills were filed, and had obtained writs of *mandamus* to enforce the levy of taxes to satisfy the judgments. In obedience to these writs the proper city authorities had levied the taxes required, but had neglected to collect them, in large measure, and, even when a portion of the taxes had been collected, had failed to appropriate the money collected to the payment of the judgments for which it had been specially levied, and to which alone it could be lawfully applied. Some of the money thus collected remained on deposit. These levies were made during the years 1875, 1876, 1877, and 1878, the city ordinances by which they were ordered specifying the amounts and the parties for whom the

taxes were levied. The complainants were also large general creditors of the city, holding its obligations, upon which nc judgments had been recovered.

Besides the special levies, made as above stated, the city authorities had made others for the purpose of paying interest on the city debt and for general uses. These taxes also remained uncollected. Meanwhile the city had nothing liable to execution at law, and no property except what it held for public uses (in distinction from private), such as public municipal buildings, parks, streets, fire apparatus, &c. It was insolvent.

Such was the situation when these bills were filed. Their object was to obtain the appointment of a receiver to take possession of the assets of the city (including the collected but not appropriated taxes, as well as the claims and bills for past-due and uncollected taxes), and to collect the same with a view to their being applied according to equity and legal right.

The principal one of the consolidated bills was filed on the twenty-eighth day of January, 1879, by Garrett *et al.* Almost immediately after it was filed, — the next day, indeed, — an act of the legislature of the State was passed, approved Jan. 31, 1879, by which the charter of the city was repealed, all power of taxation in any form was withdrawn from its authorities, and all persons holding office under the repealed acts, which constituted the charter and endowed it with power, were prohibited from attempting to exercise any of the functions of their offices. The public buildings, squares, promenades, wharves, streets, alleys, parks, fire-engines, hose and carriages, engineer instruments, and all other property, real and personal, theretofore used for municipal purposes, were declared to be transferred to the control and custody of the State, to remain public property, as it always had been, for the uses to which it had theretofore been applied. The act contained no reservation of the rights of creditors, and said nothing of any outstanding taxes which had been levied but not collected, and it was declared to take effect from and after its passage.

On the same day, Jan. 29, 1879, another act of the legislature was passed, approved Jan. 31, 1879, by which the identical territory that had been embraced in the territorial

limits of the city of Memphis was erected into what the act calls a "taxing district." The act declared that the necessary taxes for the support of the government thus established should be imposed directly by the General Assembly of the State and not otherwise. It established a board of fire and police commissioners, a committee on ordinances, or local laws, to be known as the legislative council, consisting of the commissioners of the fire and police boards and the supervisors of the board of public works. It established also a board of health, and a board of public works. It prohibited the commissioners from issuing any evidences of indebtedness, and declared that no property, real or personal, held by them for public use, should ever be subject to execution, or attachment, or seizure under any legal process for any debt created by said commissioners, and that all taxes due, or moneys in the hands of the county trustee, or on deposit, should be exempt from seizure under attachment, execution, garnishment, or other legal process. The act also declared that neither the commissioners, nor the trustee, nor the new government created by the act, should pay or be liable for any debt created by the extinct corporation (*i. e.* the city of Memphis), and that none of the taxes collected under the act should ever be used for the payment of any of the said debts. The act was declared to take effect from its passage. Its fourteenth section, as subsequently amended, declared that all the property of the city mentioned as transferred to the State by the act first mentioned should be thereby transferred to the custody and control of the board of commissioners of the taxing district, and that all indebtedness for taxes, or otherwise, whether in litigation or not, due the municipality, namely, the city, should vest in and become the property of the State, to be disposed of as should thereafter be provided by law.

These two acts were passed, as has been noticed, on the 29th of January, 1879, and approved two days thereafter.

On the 7th of February, 1879, the complainants, Garrett *et al.*, filed, by leave of the court, an amended and supplemental bill, averring what had been charged in the original, and setting forth, *inter alia*, these acts of the legislature, denying their constitutionality, and praying, as in the original bill, for

the appointment of a receiver, and praying also that the bill might be taken as a general creditors' bill for all creditors who might come in within a limited time and prove their claims.

The other bills were filed severally on Jan. 30, 1879, Feb. 3, 8, and 10, next following, and on the 12th of February the cases were consolidated, and T. J. Latham was appointed a receiver in accordance with the prayer of the complainants. He gave the required bond on the same day, and took immediate possession of the tax-books, bills, &c., of the city.

Subsequently, on the 13th of March, 1879, the legislature of the State passed another act, the first section whereof directed the governor to appoint an officer for municipal corporations whose charters had been repealed (the city of Memphis being the only one), to be known as a receiver and back-tax collector. Subsequent sections required such receiver and collector to take possession of all books, papers, and documents pertaining to the assessment and collection of the taxes embraced by the act; namely, the taxes due at the time of the repeal of the charter. It further directed that the receiver should file in the Chancery Court of the State an original creditors' bill, in the name of the State, on behalf of all the creditors, against all the delinquent tax-payers; and it provided that taxes assessed prior to 1875 might be settled in the valid indebtedness of the extinct municipality, to wit, in valid bonds, whether due or not, due coupons, and any other valid debts of such municipality, with accrued interest, whether in the shape of scrip, warrants, judgments, ledger balances, paving certificates, or receipts for money paid by tax-payers to paving contractors. It directed the receiver and back-tax collector to receive such evidences of debt at the following rates, namely: compromise bonds, at their face value; all other indebtedness at fifty cents on the dollar, except judgments, which should be received at fifty-five per cent of their face value.

The act also directed that the receiver should receive in payment of taxes levied after 1874 the indebtedness of the municipality, when there was no lien or equity requiring payment thereof in current money. It also prohibited the collector or receiver from coercing payment of a greater sum than

one-fifth of the taxes in arrear annually, so as to distribute the whole through five equal annual instalments, commencing from his appointment and qualification, — and it remitted all costs of condemnation, penalties, and charges, — provided, however, that nothing therein contained was intended to interfere with any vested rights entitling the party having such right to a speedy collection.

Under the provisions of this act, Minor Meriwether, the principal appellant, was appointed receiver and back-tax collector by the governor of the State. He accepted the appointment, and proceeded to demand the payment to him of the taxes in arrears, interfering with the receiver previously appointed by the Circuit Court, and impeding that receiver in the discharge of his duties. The complainants then filed a supplemental bill, making Meriwether a party defendant, together with some defaulting tax-payers, and praying, among other things, for an injunction against such interference.

To the consolidated bill thus amended and supplemented a general demurrer was filed, which was not sustained by the Circuit Court, and, the defendants electing to stand upon it, a final decree was entered in favor of the complainants. From that decree this appeal has been taken.

Whatever may be said of the equities of the complainants and of their power to enforce those rights in a court of equity, I agree that the decree as entered was too broad. It declared and adjudged that all the assets and property of every description theretofore belonging to the city of Memphis, or so much thereof as may be necessary for the purpose, including taxes theretofore assessed and remaining unpaid and due the city, should be applied to the payment of the debts due to the complainants and other creditors who had made, or might thereafter make, themselves parties to the suit. This included not only the private property of the city, but also that which it had held for public uses; namely, for governmental purposes and as a trustee for the State, such as the public buildings, streets, squares, parks, school-houses, promenades, fire-engines, hose and hose-carriages, engine-houses, engineer instruments, and generally everything held by the city for merely municipal purposes. To this extent, I think, the decree cannot be sus-

tained. Such property cannot be subjected to the payment of the debts of the corporation. Its public character forbids such an appropriation. It could not be subjected to taxation at the instance of the municipality. It was never held for the payment of debts. Instead thereof, it was held by the city merely as a trustee for the public. It would not be contended that it could have been taken in execution at law, and for the same reason it cannot be reached in equity to satisfy creditors.

I think, also, that part of the decree which adjudges that all the property within the limits of the territory of the city of Memphis is liable and may be subjected to the payment of all the debts owing by the city, and that such liability shall be enforced hereafter, from time to time, in such manner as the Circuit Court might order and direct, is erroneous. Notwithstanding what has been held in some of the New England States, I think the doctrine is generally accepted, that the private property of individuals within the territorial limits of a municipal corporation cannot be reached by its creditors directly, any more than the private property of stockholders in other corporations can be thus reached. It may, it is true, be subjected to taxation for the payment of the corporate debts, but the levy of taxes must be made by the corporation itself, or by the State. It is not a judicial act, and courts of equity, at least the circuit courts of the United States, cannot by their own officers levy a tax. *Rees* v. *City of Watertown*, 19 Wall. 107.

They certainly have no power to compel the levy of a tax by a corporation which is without officers and which has ceased to exist.

But while, in these particulars and for these reasons, the decree entered by the Circuit Court cannot be sustained in its full extent, I am of opinion that the complainants are entitled to some of the relief granted them by the decree. If they are not, then a new way has been discovered to pay old debts. It cannot be that a corporation, whether municipal or not, can be dissolved, and that by its dissolution its property can be withdrawn from the reach of its just creditors by any process of law or equity. No doubt there are technical difficulties in the way of maintaining proceedings at law against a corpora-

tion after its charter has been repealed, but a court of equity is competent to enforce justice to some extent, even where the processes of law fail.

A case, I think, was made by the bill for the appointment of a receiver to take into the possession of the court those taxes which had been levied by judicial direction for the payment of judgments recovered against the city, — taxes which had been only partially collected. Those taxes were in a most legitimate sense charged with a trust and a trust for the complainants. The fund to be raised by the levies was set apart for a special purpose. It could be used lawfully for no other. The ordinances which directed the levies specified the amounts to be raised, and the judgment creditors for whose use the levies were made. Those creditors were, therefore, *cestuis que trust* in the fullest sense of the term, the legal interest alone being in the city. The case shows that this trust had been neglected and abused by the trustee. The taxes which it was the duty of the city as trustee to collect had been suffered to remain uncollected in great measure, and for an unreasonable time, and even the portions which were collected had not been paid over, as the writs of *mandamus* required. This breach of duty by the trustee had continued from 1875 to 1879. Had the trustee been a natural person, or a private corporation, no one would doubt the power of a court of equity to interfere and take the trust out of the hands of the faithless trustee, either by removing him and appointing another trustee, or by administering the trust by its own officers. It can make no difference that the city of Memphis was a municipal corporation. Its character as such does not affect the nature of its obligations to its creditors, or its *cestuis que trust*, or impair the remedies they would have if the city was a common debtor or trustee. While as a municipal corporation the city had public duties to perform, yet in contracting debts authorized by the law of its organization, or in performing a private trust, it is regarded by the law as standing on the same footing as a private individual, with the same rights and duties, and with the same liabilities, as attend such persons. Over its public duties, it may be admitted, the legislature has plenary authority. Over its private obligations it has not. *Bailey* v

The Mayor, &c. of the City of New York, 3 Hill (N. Y.), 531 *Small* v. *The Inhabitants of Danville*, 51 Me. 359; *Oliver* v. *Worcester*, 102 Mass. 489; Dillon, Mun. Corp., sect. 39, and cases cited in the notes.

Moreover, if, as contended by the appellants, the city of Memphis ceased to have any legal existence on the thirty-first day of January, 1879, when the legislative act repealing the charter was approved, the case then became one of a trust without a trustee, pre-eminently fit for equitable interference. A court of equity will not permit a private trust to fail for want of a trustee. And this rule is applicable to cases in which a municipal corporation has been nominated the trustee. *Girard* v. *Philadelphia*, 7 Wall. 1; *Philadelphia* v. *Fox*, 64 Pa. St. 169; *Montpelier* v. *East Montpelier*, 29 Vt. 12. In such cases, as in cases where a natural person or a private corporation is the trustee, and the person has died or the corporation has been dissolved, the court will appoint a new trustee, or execute the trust by its own officers or agents. In Potter on Corporations, sect. 699, it is said: "Where in any way the legal existence of municipal trustees is destroyed by legislative act, a court of equity will assume the execution of the trust, and, if necessary, will appoint new trustees to take charge of the property, and carry into effect the trust." In High on Receivers, 304, 305, it is said: "When creditors of a corporation have a charge upon a particular fund, in the nature of a trust fund, the mismanagement or waste of such fund by those intrusted with its control will warrant the appointment of a receiver."

So in *Batesville Institute* v. *Kauffman* (18 Wall. 151), this court, when speaking of the power of a court to appoint a new trustee in place of one deceased, said: "It is, however, within the power of a court of equity to decree and enforce the execution of the trust through its own officers and agents, without the intervention of a new trustee," citing Story's Equity, 976–1060.

Without further citations, which might easily be made, enough has been said to show that in the present case the Circuit Court was authorized to seize by the hands of its own receiver, for administration, those taxes which had been levied

specially for the payment of judgments recovered, in regard to which the city had occupied the relation of a trustee, at least practically.

Much of what I have said is equally applicable to the taxes which the city during its corporate existence had levied for the payment of interest on its debt, or for other purposes, and had not collected, and generally to all the assets of the city of every character, except such as I have heretofore mentioned, held for strictly public uses, such as public buildings, parks, fire-apparatus, &c. These general assets, though not held specially in trust for any particular creditors, were held by the corporation, in a very just sense, for the benefit of its creditors. The corporation having ceased to exist, it was perfectly within the power of the Circuit Court, sitting as a court of equity, to seize all its assets to which its creditors have an equitable or legal claim, and hold them for administration. Such assets cannot be appropriated to any other use until the creditors are satisfied. Even legislative action cannot divert them to other uses. These principles have been fully recognized, and particularly in the code of Tennessee. Referring to dissolved corporations, that code enacts (sect. 3426): "The court shall appoint a receiver, with full power to take possession of all the debts and property, and sell and dispose of, collect and distribute, the same among the creditors and other persons interested, under the orders of the court." This statute is only an affirmance of equitable remedies before acknowledged and found in text-books. Thus, in Potter on Corporations (sects. 714, 715), the rule is thus stated: "Whatever technical difficulties exist in maintaining an action at law against a corporation after its charter has been repealed, in the apprehension of a court of equity there is no difficulty in a creditor's following the property of the corporation into the hands of one not a *bona fide* creditor or purchaser, asserting his lien thereon, and obtaining satisfaction of his debt." In *Broughton* v. *Pensacola* (93 U. S. 266), the language of the court was: "The ancient doctrine that, upon the repeal of a private corporation, its debts were extinguished, and its real property reverted to its grantors, and its personal property vested in the State, has been so far modified by modern adjudications that a court of equity will now

lay hold of the property of a dissolved corporation and admin ister it for the benefit of its creditors and stockholders. The obligation of contracts, made whilst the corporation was in existence, survives its dissolution; and the contracts may be enforced by a court of equity, so far as to subject, for their satisfaction, any property possessed by the corporation at the time. In the view of equity, its property constitutes a trust fund pledged to the payment of the debts of creditors and stockholders; and if a municipal corporation, upon the surrender or extinction in other ways of its charter, is possessed of any property, a court of equity will equally take possession of it for the benefit of the creditors of the corporation."

So in *Curran* v. *Arkansas* (15 How. 307), it was said, "The assets of a corporation are assets for the payment of its debts, and are trust funds for that purpose." See also *Maenhout* v. *New Orleans*, 2 Woods, 108–114.

In Dillon on Municipal Corporations, sect. 37, the rule is stated thus: "Where the legal existence of a municipal trustee is destroyed by legislative act, a court of chancery will assume the execution of the trust, . . . take charge of the property, and carry into effect the trust."

In *Beckwith* v. *Racine* (7 Biss. 142) the court said: "Where a contract cannot be enforced at law against a municipal corporation owing to a repeal of its charter, and there are any funds, a court of equity will administer them for the benefit of creditors."

It is hardly necessary to say that the private property of a municipal corporation is so decidedly stamped with a trust in favor of its creditors, that it is incapable of being diverted to other uses by the legislation of the State. This law has again and again been declared. *Grogan* v. *San Francisco*, 18 Cal. 590, by Field, J.; *Board of Park Commissioners* v. *Common Council of Detroit*, 28 Mich. 228; *City of Dubuque* v. *Ill. Cent. Railroad Co.*, 67, 68.

The citations I have made (many others might be added) are sufficient to maintain the jurisdiction of the Circuit Court in this case, and its power to lay hold, by its receiver, of all the property and assets belonging to the city of Memphis, when its charter was repealed, including all taxes levied and

collected but undisposed of, and all taxes uncollected, all property purchased by the city in sales for taxes, and all assets of every description, except the property above mentioned held for strictly public uses, and also to administer such assets for the benefit of the creditors.

I do not contend that a court of equity can itself *levy* a tax. I agree it cannot, and so this court has decided. *Rees* v. *City of Watertown*, 19 Wall. 107. The argument which has been submitted to prove that the Circuit Court has no such power is quite unnecessary. It is inapplicable to the case we have in hand. The complainants' bill asked for no assessment or levy of a tax, and the Circuit Court decreed none. The levy of a tax is a very distinct thing from the collection of a tax already levied. The levy is generally a legislative or a quasi-judicial act. The collection of a tax after it has been levied is a ministerial act, which a court has power to enforce.

I have said, and I earnestly maintain, that the taxes which the city of Memphis had levied before the repeal of its charter, some of which were collected, but remained on deposit or undisposed of, and some of which are not collected, are assets of the corporation, which its creditors have an equitable right to have seized and appropriated to the payment of the corporate debts. By the lawful assessment and levy of a tax the taxpayer becomes a debtor to the municipality, and the debt may be recovered, like other debts, by a suit at law; or, when it is a lien, by a bill of equity. Such certainly is the law of Tennessee. *Mayor & Aldermen of Jonesboro* v. *McKee*, 2 Yerg. (Tenn.) 167; *Rutledge* v. *Fogg*, 3 Coldw. (Tenn.) 554; *Marr* v. *The Bank of West Tennessee*, 4 id. 487. The imposition of a tax creates a legal obligation to pay. In *Savings Bank* v. *United States* (19 Wall. 227), this court ruled that, independently of an act of Congress authorizing them, suits at law may be maintained by the United States to recover taxes assessed and levied. The statutes of Tennessee leave the matter in no doubt, so far as it relates to the rule in that State. And in the Civil Code, sects. 554, 555, it is enacted that assessed taxes shall be and remain liens upon all taxable property of the person against whom they are assessed. If they are liens, they are enforceable in equity.

It is passing strange if those claims, which, by the law of the State, are debts due to the city and collectible as such by the ordinary processes of law, are not assets of the corporation for the payment of its debts. And if they can be collected in the State courts, I am unable to see why the Circuit Court of the United States, sitting in Tennessee, and having jurisdiction, may not also collect them, or seize them as assets of an insolvent and dissolved corporation. I cannot perceive why they are not as truly assets of the city as are the assessments made by an insolvent mutual insurance company its assets. Nobody would deny that such assessments could be seized by a court of equity, through the agency of its receiver, and administered for the benefit of the creditors of the company. No difficulty would be found in the way of collecting them.

Thus far I have considered the merits of the case as unaffected by the legislation of the State, heretofore spoken of, except so far as that legislation repealed the charter of the city. That legislation was certainly very extraordinary, and quite unprecedented in the history of the country since the Federal Constitution was adopted. Whatever may have been its purpose, and however carefully that purpose may have been disguised, if it can be sustained, its *effect* is to obstruct, if not totally destroy, all the power of the creditors of the city to enforce payment of the debts due them. They are remanded to the mere grace and favor of the legislature. If ever legislation impaired the obligation of contracts, this did. If it had been simply the repeal of the municipal charter, no one could have called it in question. Undoubtedly the legislature of a State may amend or dissolve the organization of a municipal corporation, so far as its governmental powers are concerned. But no legislature can so dissolve a corporation, municipal or private, as to destroy or impair the obligation of any contracts the corporation may have made. Dillon, Mun. Corp., sect. 114; *Von Hoffman* v. *City of Quincy*, 4 Wall. 535. Creditors of municipal corporations are as completely within the protection of the Constitution as any other creditors. What is meant by "impairing the obligation of a contract" is well defined. Embarrassments thrown by a statute in the way of enforcing payment of a debt, or a statutory substitution for the obligation and lia-

bility of the debtor, of the will of some other person, though that person be a State, have not heretofore been recognized as consistent with the Constitution. The protection afforded by its provisions and its prohibition of certain State legislation relate, not to the mode and form of State statutes, but to their operation or effect.

In the view I take of the case, however, it is unnecessary to decide how far the legislation of the State is constitutional, or how far it is in conflict, if at all, with the paramount law which controls alike State and natural persons. Certainly the appointment by the governor of Meriwether as a receiver and back-tax collector can have no effect upon the prior appointment of Latham by the Circuit Court. It cannot confer upon Meriwether any right to interfere with the performance of the duties which the court had imposed upon its receiver. The jurisdiction of the Circuit Court had fully attached, and, by the action of its receiver, the assets of the city, the tax-bills and books, had come into the possession of the court before Meriwether's appointment. That jurisdiction and possession cannot be divested by any State action. The injunction decreed against Meriwether was, therefore, I think, properly adjudged.

I have thus stated, as briefly as possible, my reasons for dissenting from the action of the majority of the court, reversing the decree of the court below and ordering a dismissal of the complainants' bill.

I think the decree should be modified by striking out so much of it as subjects to the payment of the debts of the city the property held exclusively for public uses, and so much as subjects to such payment the private property of all persons within the city's territorial limits.

Thus modified, I think the decree should be affirmed.

WADSWORTH v. SUPERVISORS.

The rulings in *Aspinwall et al.* v. *Commissioners of the County of Daviess* (22 How. 364) reaffirmed and applied to this case.

APPEAL from the Circuit Court of the United States for the Western District of Wisconsin.

The facts are stated in the opinion of the court.

The case was argued by *Mr. Matthew H. Carpenter* for the appellant, and by *Mr. W. P. Bartlett* for the appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

By an act of the legislature of Wisconsin, approved April 1, 1864, the legal voters of certain counties, among which are the counties of Eau Claire and St. Croix, were authorized to vote upon the subject of municipal aid in the construction of a railroad from Tomah to Lake St. Croix, by the Tomah and Lake St. Croix Railroad Company, subsequently called the West Wisconsin Railway Company.

The act declared that "if a majority of the ballots cast in any of said counties be for railroad aid, the county board of supervisors of said counties shall have power, by resolution, to cause to be issued bonds of the denomination of one hundred to one thousand dollars each, to an amount not exceeding $50,000 for each of said counties, payable thirty years after the date thereof, with interest at the rate of seven per cent, payable semi-annually in the city of New York, at such place as the treasurer of the State shall designate." The board of supervisors of each of the counties voting such aid were required to "annually cause to be levied and collected, as other State and county taxes are collected, a sum of money sufficient to pay the interest accruing and existing by reason of the bonds which either of said counties *may* issue, at the rate aforesaid, and such further amount to defray any expense attending the payment of such interest."

The act further provided that "the said bonds, when authorized to be issued as aforesaid, shall be *held* by the county

board of supervisors of each of said counties, and the same, or the avails thereof, shall be expended in the counties which issue the same (provided the railroad passes through the said county), in the grading of said railroad, or in the purchase of ties therefor; and the said bonds shall be delivered to the said railroad company when the board of supervisors of each of said counties are satisfied that the same will be applied for such purpose."

On the 5th of November, 1867, an election was held in the county of Eau Claire, at which a majority of votes were cast in favor of aid, to the extent of $50,000, to the Tomah and Lake St. Croix Railroad Company. The road was constructed through the county prior to March 10, 1870, but it does not appear when the work of such construction was commenced. The entire road was, however, fully constructed on or about Dec. 1, 1871, since which date it has been operated as a rail way.

On and prior to March 15, 1870, the company demanded of the board of supervisors for the county of Eau Claire, county bonds to the amount of $50,000, and payable as required by the statute. The board refused to comply with that demand, and made the following record of such refusal, viz.: "The county board of supervisors of Eau Claire County met at the office of the clerk, all members present. The board took up the subject of issuing the bonds of the county to the West Wisconsin Railroad Company as voted in 1867, and expressed themselves as willing to issue the bonds of the county if they could be paid by a tax as understood at the time the vote was taken, but as our highest courts have decided that it is illegal to levy and collect a tax to pay such bonds, they refuse to issue them. They are unwilling to issue the bonds of the county which cannot be paid, but must be repudiated in the end, for the reason that it would be unjust to the bondholder, and a disgrace to the county, and requested the county board of supervisors of said county to cause said bonds to be issued and delivered to the said company as required by law and the aforesaid vote of the electors of said county."

There is some confusion in the language employed in this minute of the proceedings of the county board, but there can

be no doubt as to the grounds upon which it refused to execute and deliver the bonds.

By an act approved March 25, 1872, so much of the act of April 1, 1864, as authorized the counties of St. Croix and Eau Claire to issue bonds in aid of the construction of a railroad from Tomah to Lake St. Croix was *repealed*.

On or about Sept. 1, 1875, the railroad company, for a valuable consideration, assigned and transferred to Wadsworth all and every cause of action, in law or equity, it then had, or to which it was entitled, against the county of Eau Claire, by reason of the failure and refusal of its board of supervisors to issue and deliver county bonds in accordance with the vote of the people.

The object of the present suit in equity, by Wadsworth as assignee of the company, is to compel the execution and delivery to him of such bonds. To the bill filed a demurrer was sustained, and a decree entered for the defendants.

In the view which the court takes of this case, it may be assumed that due notice was given of the election held on the 5th of November, 1867.

The main question then presented is, whether the county of Eau Claire ever came under a legal obligation to execute and deliver to the railroad company, county bonds to aid in the construction of the road from Tomah to Lake St. Croix? The decision of that question, it seems to the court, is controlled by the principles announced in *Aspinwall, &c.* v. *Commissioners, &c*, 22 How. 364. That case involved the validity of certain county bonds which were in the hands of *bona fide* holders for value, having been issued by the board of commissioners for Daviess County, Indiana, in payment of a subscription made in behalf of the county to the capital stock of an incorporated railroad company. The subscription was made under the sanction of a popular vote and in conformity with the charter of the railroad company, which made it the duty of the commissioners to subscribe for the stock and issue bonds in payment thereof, whenever a majority of qualified voters of the county, at an election held for that purpose, should declare in favor of such subscription.

It, however, appeared that after the people had voted in

favor of the subscription, but before any subscription was in fact made, a new constitution for Indiana went into operation, containing, among others, the provision that "no county shall subscribe for stock in any incorporated company, unless the same be paid for at the time of such subscription; nor shall any county loan its credit to any incorporated company; nor borrow money for the purpose of taking stock in any such company."

It was argued in that case, that as the statute under which the election was held made it the duty of the commissioners to subscribe for the stock and issue county bonds in payment thereof, the right of the railroad company to receive the bonds became complete and perfect when a majority of legal voters declared in favor of the subscription; and that such right was not, and consistently with the contract clause of the national Constitution could not be, affected by any subsequent changes in the organic law of the State. To that position this court was unable to give its assent. The reluctance expressed in its opinion is not to be construed as implying doubt as to the correctness of the legal conclusions there reached, but only as referring to the fact that the bonds in suit were in the hands of those who, for aught that appeared, had purchased them in the belief that they were valid obligations of the county. We held in that case that the popular vote did not itself create a vested right in the railroad company to the bonds, and that a subscription was necessary to create a contract binding the county to issue bonds in payment of the stock, and binding the company to issue stock for the bonds. "Until the subscription is made," said Mr. Justice Nelson, speaking for the whole court, "the contract is unexecuted and obligatory upon neither party." Hence, the new State Constitution was held to govern the case, and from the time of its adoption to have withdrawn from the county commissioners all authority to make subscriptions to the stock of incorporated companies, except in the manner and under the circumstances prescribed by that instrument.

Applying the doctrines announced in *Aspinwall, &c.* v. *Commissioners, &c.*, to the present case, it is clear that there was no binding agreement or contract between the railroad com-

pany and the county of Eau Claire, by which the latter became legally bound, through its board of supervisors, to execute and deliver bonds to aid in the construction of the road from Tomah to Lake St. Croix. The act of April 1, 1864, neither in express words nor by necessary implication, made it imperative upon the board of supervisors to issue bonds in pursuance of the popular vote. The act was an enabling one, and its legal effect was to invest the board with power to supplement the expressed will of the people by an issue of bonds. We find nothing in its provisions justifying the conclusion that the popular vote was to be taken as an absolute direction that the supervisors should issue the bonds, at all events, and without regard to the circumstances intervening after the people had voted in favor of county aid to the enterprise in question.

It will be observed that the act of 1864 did not contemplate a subscription of stock upon the part of the county, but simply a donation of bonds to aid in the construction of the road. We can understand why the legislature might invest the constituted authorities of the county with large discretion as to the exercise of a power to issue bonds by way merely of donation to aid in the construction of a railroad. But whether sound policy indicated such a course, it is not material to inquire, since our duty is to ascertain the legislative intent, and, if possible and consistent with the law, to give it effect according to the reasonable interpretation of the words employed to express that intent.

As the statute only declared that the supervisors should have *power*, by resolution, to cause bonds to be issued when the people voted in favor of railroad aid, we are not at liberty to say that the legislature meant such vote to be a positive command to exercise that power without regard to the circumstances arising after the expression of the popular will.

But if we should be mistaken in this construction of the statute, — if the statute had, in terms, made it the duty of the supervisors to issue bonds, to the extent indicated by the popular vote, — we should feel bound, upon the authority of *Aspinwall, &c.* v. *Commissioners, &c.*, to hold that the legislature could, at any time before the bonds were in fact issued, or before the county came under a legal obligation to issue them, repeal, as

it did, the statute conferring the power to issue, and thereby withdraw from the supervisors all authority in the premises. The election at which the people gave their sanction to railroad aid had, as we have seen, no other effect than to confer power upon the supervisors to issue bonds, and did not place them under any legal obligation to the railroad company to exercise the power granted. The railroad company had not, prior to the passage of the act of 1872, acquired any perfect or vested right to the donation. The repealing statute of 1864 was, under the circumstances, a total abrogation or obliteration of the law repealed, as much so as if the latter had never existed.

We have not overlooked the averments in the bill that the company constructed its road through Eau Claire County at a cost, in grading and in the purchase of ties, exceeding the sum of $50,000; that such work was done, and such money expended upon the faith of the aid voted, and with "the full understanding and belief" that the bonds would be issued and delivered to the company; and that the company would not have built the road and expended the money except in reliance upon an issue of the bonds as authorized by the statute.

With whom such understanding was had, and upon what special facts such belief was based, does not appear from any specific allegations in the bill. The seventh section of the act of 1864 directed that the bonds, "when authorized to be issued as aforesaid," that is, when issued under the power conferred by popular election, should be held by the supervisors, and not delivered until they should be satisfied that the proceeds would be expended in the grading of the road in the county issuing them, or in the purchase of ties therefor. Had the bonds been in fact executed before the act of 1872, but retained by the supervisors under an agreement for their delivery when the purposes indicated by the section just cited had been met, there might have been some ground for holding that the power given by the statute to issue the bonds had been finally and fully exercised by the supervisors, and that, in such case, the railroad company would have been entitled to enforce their delivery, upon the completion of the road through the county, or after the expenditure of an equal amount, either in the grading of

the part of the road which lay in that county, or in the purchase of ties therefor. But we have seen that the bonds had not in fact, been executed, when the power to issue and deliver them was withdrawn by the legislature. The discretion conferred upon the supervisors had not then been exercised. If the company chose to enter upon the work of construction in the county before the supervisors had, in fact, elected to exert the power conferred by the statute, and without any agreement, upon sufficient consideration, binding the county to execute and deliver the bonds, their understanding, however induced, and their belief, upon whatever facts based, that the bonds would, at some future time, be issued and delivered, could not trammel the power of the legislature, or prevent it from withdrawing the authority conferred upon the supervisors in the act of 1864.

Nor do we think it at all material in the determination of this case that the supervisors expressed upon their records a willingness to issue the bonds, and that they were restrained from so doing by the circumstance that the Supreme Court of Wisconsin had judicially declared that the payment of the bonds, if issued, could not be enforced. The cases in that court to which, as we suppose, the supervisors referred were *Curtis* v. *Whipple* (24 Wis. 350) and *Whiting* v. *The Sheboygan & Fond du Lac Railroad Co., &c.* (25 id. 167), in the former of which, decided in 1869, it was held that the legislature had no power to raise money, or to authorize it to be raised, by taxation, for the purpose of donating it to a private educational institution; and in the latter, decided in 1870, that no such power existed to make a donation in aid of the construction of a railroad owned, managed, and operated by a corporation in all respects private, except that in its behalf the power of eminent domain might be exercised, and except also that it was charged with certain public duties and was subject to certain public uses. Notwithstanding the reasons assigned by the supervisors for the non-issue of the bonds, the fact remained that they did not, prior to the repealing act of 1872, assume to impose any legal obligation upon the county, either by an actual issue of the bonds, or by an agreement to issue and deliver them upon the completion of the road through the

county. Under this view of the case we need not consider the question, suggested by counsel, as to how far the rights of parties are to be controlled by the decisions of the Supreme Court of the State, rendered after the election of 1867, upon the subject of municipal donations to railroad and other private corporations.

What has been said is sufficient to dispose of the case.

The decree below sustaining the demurrer was correct, and is

Affirmed.

LORD v. STEAMSHIP COMPANY.

1. While navigating the high seas between ports of the same State, a vessel of the United States is, together with the business in which she is engaged, subject to the regulating power of Congress.
2. Sect. 4283 of the Revised Statutes, as limited in its application by sect. 4289, is not unconstitutional.

ERROR to the Circuit Court of the United States for the District of California.

Sects. 4283 and 4289 of the Revised Statutes are as follows: —

"SECT. 4283. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing lost, damage or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount of the value of the interest of such owner in such vessel, and her freight then pending."

"SECT. 4289. The provision of the seven preceding sections relating to the limitation of the liability of the owners of vessels shall not apply to the owners of any canal-boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation."

Sect 4283 was one of the seven sections referred to in sect. 4289.

The steamship "Ventura," owned by the defendant in error, the Goodall, Nelson, and Perkins Steamship Company, was employed in navigation between San Francisco and San Diego, in the State of California, touching at the intermediate ports on the coast. In making her voyages she ran a distance of four hundred and eighty miles on the Pacific Ocean. She formed part of a transportation line which was largely engaged in foreign and inter-state commerce, but was herself only employed on her own route, and neither took on nor put off goods outside of the State of California. While on one of her regular voyages from San Francisco to San Diego she was totally lost, with all her pending freight and cargo, on the coast of California, without the privity or knowledge of her owner. This suit was brought against her owner as a common carrier to recover the value of the goods lost. The cargo was mostly owned by retail merchants in San Diego and other places in California who had made purchases for their business from wholesale merchants in San Francisco and was in transit from there. The steamship company pleaded its exemption from liability as owner of the vessel under sect. 4283 of the Revised Statutes. On the trial the court instructed the jury "that if the jury believed that the said losses occurred solely by reason of the negligence of the master of said ship and without the privity or knowledge or neglect of said defendant, that said sect. 4283 of the Revised Statutes fully exonerated the defendant from liability for any such losses, notwithstanding the goods when lost were being transported on a journey, the final termini of which were different points in the State of California." To this charge an exception was duly taken. The jury found in favor of the defendant, and judgment was rendered accordingly. To reverse that judgment the present writ of error was sued out.

Mr. Samuel F. Leib and *Mr. Charles A. Kent*, for the plaintiff in error.

Sect. 4283 of the Revised Statutes has no application to the case at bar, for it has repeatedly been held that the clause of the Constitution conferring upon Congress the power to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes," does not authorize

that body to exercise any control over the purely internal commerce of a State. *Gibbons* v. *Ogden*, 9 Wheat. 1; *License Cases*, 5 How. 504; *Passenger Cases*, 7 id. 283; *Allen* v. *Newberry*, 21 id. 244; *Maguire* v. *Card*, id. 248; *Sinnot* v. *Davenport*, 22 id. 227; *Moore* v. *American Transportation Co.*, 24 id. 1; *United States* v. *Holliday*, 3 Wall. 407; *License Tax Cases*, 5 id. 462; *Steamship Company* v. *Port Wardens*, 6 id. 31; *Woodruff* v. *Parham*, 8 id. 123; *United States* v. *Dewitt*, 9 id. 41; *The Daniel Ball*, 10 id. 557; *State Tonnage Tax Cases*, 12 id. 204; *Case of the State Freight Tax*, 15 id. 232; *Peete* v. *Morgan*, 19 id. 581; *The Seneca*, 1 Biss. 371; *The Tug Oconto*, 5 id. 463, and cases cited; *The Mary Washington*, 1 Abb. (U. S.) 1; *The James Morrison*, 1 Newb. Adm. 241; *Sears* v. *The Board, &c.*, 36 Ind. 270; *Navigation Company* v. *Dwyer*, 29 Tex. 382; Story, Const., sect. 1061.

Mr. John E. Ward, contra.

Congress did not, in passing sect. 4283 of the Revised Statutes, attempt or intend to exercise any power over the internal commerce of a State. Its object was to regulate an instrument of commerce over which it had undoubted control.

MR. CHIEF JUSTICE WAITE, after stating the facts, delivered the opinion of the court.

The single question presented by the assignment of errors is, whether Congress has power to regulate the liability of the owners of vessels navigating the high seas, but engaged only in the transportation of goods and passengers between ports and places in the same State. It is conceded that while the Ventura carried goods from place to place in California, her voyages were always ocean voyages.

Congress has power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes" (Const., art. 1, sect. 8), but it has nothing to do with the purely internal commerce of the States, that is to say, with such commerce as is carried on between different parts of the same State, if its operations are confined exclusively to the jurisdiction and territory of that State, and do not affect other nations or States or the Indian tribes. This has never been disputed since the case of *Gibbons* v. *Ogden*, 9 Wheat. 1. The

contracts sued on in the present case were in effect to carry goods from San Francisco to San Diego by the way of the Pacific Ocean. They could not be performed except by going not only out of California, but out of the United States as well.

Commerce includes intercourse, navigation, and not traffic alone. This also was settled in *Gibbons* v. *Ogden*, *supra*. "Commerce with foreign nations," says Mr. Justice Daniel, for the court, in *Veazie* v. *Moor* (14 How. 568), "must signify commerce which, in some sense, is necessarily connected with these nations, transactions which either immediately or at some stage of their progress must be extra-territorial." p. 573.

The Pacific Ocean belongs to no one nation, but is the common property of all. When, therefore, the Ventura went out from San Francisco or San Diego on her several voyages, she entered on a navigation which was necessarily connected with other nations. While on the ocean her national character only was recognized, and she was subject to such laws as the commercial nations of the world had, by usage or otherwise, agreed on for the government of the vehicles of commerce occupying this common property of all mankind. She was navigating among the vessels of other nations and was treated by them as belonging to the country whose flag she carried. True, she was not trading with them, but she was navigating with them, and consequently with them was engaged in commerce. If in her navigation she inflicted a wrong on another country, the United States, and not the State of California, must answer for what was done. In every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations, and as such she and the business in which she was engaged were subject to the regulating power of Congress.

Navigation on the high seas is necessarily national in its character. Such navigation is clearly a matter of "external concern," affecting the nation as a nation in its external affairs. It must, therefore, be subject to the national government.

This disposes of the case, since, by sect. 4289 of the Revised Statutes, the provisions of sect. 4283 are not applicable to vessels used in rivers or inland navigation, and this legislation, therefore, is relieved from the objection that proved fatal to the trade-mark law which was considered in *Trade-Mark Cases*,

100 U. S. 82. The commerce regulated is expressly confined to a kind over which Congress has been given control. There is not here, as in *Allen* v. *Newberry* (21 How. 244), a question of admiralty jurisdiction under the law of 1845, but of the power of Congress over the commerce of the United States. The contracts sued on do not relate to the purely internal commerce of a State, but impliedly, at least, connect themselves with the commerce of the world, because in their performance the laws of nations on the high seas may be involved, and the United States compelled to respond.

Having found ample authority for the act as it now stands in the commerce clause of the Constitution, it is unnecessary to consider whether it is within the judicial power of the United States over cases of admiralty and maritime jurisdiction.

Judgment affirmed.

INSURANCE COMPANY *v.* ELDREDGE.

Where a deed of trust of lands to secure a promissory note was released by the trustee without the surrender or payment of the note or the express authority of the holder thereof, a subsequent purchaser with notice takes them subject to the equitable rights of such holder.

APPEAL from the Supreme Court of the District of Columbia.

The facts are stated in the opinion of the court.

Mr. Walter D. Davidge and *Mr. Samuel R. Bond* for the appellant.

Mr. Enoch Totten, contra.

MR. JUSTICE FIELD delivered the opinion of the court.

In November, 1871, John Van Riswick sold and conveyed certain real property in the city of Washington, of which he then was the owner, to one George B. Coburn, for the sum of $7,734.40, for which the latter gave his three promissory notes, each for $2,578.13, payable respectively in one, two, and three years after date, with interest. To secure these notes, Coburn

executed to one William H. Ward a deed of trust of the property. This deed authorized Ward, upon default in payment of either of the notes, to sell the property, and upon full payment of the notes, and not otherwise, to release and reconvey the property to Coburn. The deed was recorded the same month. In February, 1872, Coburn sold and conveyed the property to one Edwin E. Mayhew, subject to the deed of trust.

In June, 1872, two persons by the names of Aistrop and Dudley jointly borrowed of the complainant, Eldredge, $4,000, for which they gave their note payable in sixty days, and as collateral security delivered to him two of the three notes of Coburn before mentioned, which had been indorsed to them.

In October following, Mayhew, who had subdivided the property into sixteen lots, upon eight of which, fronting on 14th Street, houses were then being constructed, applied to the Connecticut General Life Insurance Company, through its agent at Washington, John G. Bigelow, for a loan of $32,000; and through him the loan was effected, and secured by a deed of trust upon each of the eight lots. To obtain this loan it became necessary to have the existing incumbrances upon the property discharged. The company would not take the property as security with any prior lien upon it. In addition to the deed of trust to secure Coburn's notes, the property was then subject to a prior deed of trust, executed by a former owner, to secure the sum of $7,000. The insurance company left the matter of investigating the title and determining as to the sufficiency of the security to Bigelow, who was specially instructed to see that the company had the first lien upon the property. He employed Ward, the trustee of the Coburn deed, to examine and report upon the title. In compliance, it would seem, with Bigelow's wishes and in conjunction with Van Riswick, who described himself as the holder of the first note of Coburn, but without the consent or knowledge of the complainant, then holding the other two notes, Ward executed a deed of release of the property. It is to set aside this deed, as a fraud upon the rights of the complainant, that the present suit is brought.

It is very plain, from the evidence contained in the record,

that Bigelow, in the course of his inquiries as to the condition of the property, became fully acquainted with the existence of the deeds of trust, and learned that the notes secured were not paid. The deeds were on record, and he was bound to take notice of them. The deed of Coburn designated the notes and limited the power of the trustee to release the property. He was in terms authorized to release and reconvey it only upon the full payment of the notes, and not otherwise. The deed showed the time the notes had to run, and that by their terms they were not then due. Unless paid at the time, or, what would be deemed equivalent, surrendered, the trustee had no authority to execute the release. It was not sufficient that the original payees of the notes joined in the instrument or consented to its execution. So far as they had parted with the notes they were denuded of power over the subject.

It is not necessary to express any opinion as to the authority of a trustee to release property conveyed to him at any time, where no such restriction, as in the present case, is in terms placed upon his power. We confine our language to the precise point before us. Here there was no authority on the part of the trustee to execute the deed until payment of the notes was made. The fact of their non-payment being known to Bigelow, the agent of the insurance company, knowledge of it must be imputed to the company, his principal; and both must be charged with knowledge of the law and the consequent inability of the trustee, at the time, to release the property.

To prevent misapprehension, it is proper to state that we do not wish to intimate any opinion upon the general question, whether a purchaser of property may not rely upon a release of a previous mortgage or trust-deed found upon the official records of the district where the property is situated, without further inquiry, where he has no knowledge of the non-payment of the indebtedness secured; but what we hold is, that where a purchaser (and a mortgagee or trustee of a trust-deed stands in the same position), at the time of taking a deed, has information that a prior mortgagee or trustee of a prior deed has released the property from the mortgage or trust, without payment of the notes or their surrender, or express authority from the holder of them, he will take the property subject to

any equitable right of the holder of the notes, to secure the payment of which the mortgage or trust-deed was executed.

As to the position that the complainant is barred of the relief he asks by laches in asserting his claim, we do not think there is any force in it. The company, as already stated, must be deemed to have known of the want of power in the trustee to release the property from the Coburn deed, and it does not lie in its mouth to object that the complainant did not sooner seek to set aside the priority of lien thus gained; nor can it aver that his claim to have the instrument cancelled, by which this priority was secured, is a stale one, when asserted within the period allowed by law, and no rights of third parties as *bona fide* purchasers have intervened to render inequitable the assertion of his original lien.

Decree affirmed.

UNITED STATES v. PINSON.

The account of a delinquent revenue officer or other person accountable for public money, as finally adjusted by the proper officers of the Treasury Department, is not admissible as evidence under sect. 886, Rev. Stat., unless it be certified and authenticated to be a transcript from the books and proceedings of that department. A certificate, therefore, which states that the transcript, to which it is annexed, is a copy of the original on file is not sufficient, that being the form used in reference to mere copies of bonds, contracts, or other papers connected with the final adjustment.

ERROR to the Circuit Court of the United States for the Western District of Tennessee.

The facts are stated in the opinion of the court.

The Solicitor-General for the United States.

Mr. B. M. Estes and *Mr. Henry T. Ellett, contra.*

MR. JUSTICE HARLAN delivered the opinion of the court.

This is an action against the executrix of one of several sureties on the official bond, executed April 9, 1858, of Miles H. Morris, formerly a purser in the navy. The government claims that deceased failed to account for certain clothing received by

him as purser on board the ship "Vandalia," and for a large amount of public money received by him as purser and disbursing officer on board the ship "Seminole."

The bill of exceptions states that the district attorney, after reading in evidence a certified copy of the bond of Morris, as purser in the navy, offered to read to the jury, as evidence in behalf of the United States, "the account of Miles H. Morris, as purser in the United States Navy, as certified by the Treasury Department." The account, thus offered, is made up of several distinct papers, as follows: Brief to accompany the account of Miles H. Morris, late paymaster U. S. Navy; abstract of expenditures of Miles H. Morris, paymaster U. S. S. "Vandalia;" abstract of clothing and small stores; abstract of expenditures of Miles H. Morris, paymaster U. S. S. "Seminole;" statement of the account of Miles H. Morris, a purser U. S. S. "Vandalia," from May 19, 1858, to Jan. 6, 1860; statement of the account of Miles H. Morris, paymaster U. S. S. "Seminole," from May 1, 1860, to March 12, 1861, report 4,805; statement of the account of M. H. Morris, late paymaster U. S. Navy, supplementary to report 4,805; statement of the account of M. H. Morris, late paymaster U. S. Navy, supplementary to report 161 A.

To these abstracts and statements is appended a certificate or communication by the Fourth Auditor in the Treasury Department, under date of Jan. 19, 1874, addressed to the Second Comptroller of the Treasury, stating that he had examined and adjusted the account of Morris, late paymaster United States Navy, supplementary to his account of "Seminole" report 161 A, and found that there was due from him to the United States the sum of $5,922.60 under certain heads of appropriations which are specified, and also that the statements and accounts showing such balance were therewith transmitted to the Second Comptroller for his decision thereon. There is also appended a statement by the Second Comptroller, under date of Jan. 20, 1874, to the effect that he admitted and certified the balance reported by the Fourth Auditor.

Prefixed to the foregoing papers is the certificate of the Secretary of the Treasury, under the seal of that department, to the effect that William B. Moore, who certified the

"annexed transcript," was then, and at the time of doing so was, deputy Fourth Auditor of the Treasury, and that full faith and credit were due to his official attestations.

Following that of the Secretary was a certificate in these words: —

"TREASURY DEPARTMENT, FOURTH AUDITOR'S OFFICE.
"July 23, 1875.

"Pursuant to an act of Congress to provide for the prompt settlement of public accounts, approved 3d of March, 1817, I, William B. Moore, deputy Fourth Auditor of the Treasury Department, do hereby certify that the annexed transcripts are true copies of the originals on file in this office. WM. B. MOORE."

To the reading of the foregoing "account" or "transcript" the defendant objected, and the objection was sustained, to which ruling an exception was taken by the government. Under instructions from the court, a verdict was then returned for the defendant.

Whether the papers offered in evidence by the government are competent evidence in support of its claim, is the general question presented for our determination.

By the law, as it has long existed, it is the duty of the Fourth Auditor of the Treasury Department to receive and examine all accounts accruing in the Navy Department, or relating thereto, and after such examination to certify the balances, transmitting such accounts, with the vouchers and certificates, to the Second Comptroller for his decision thereon. Rev. Stat., sect. 277. Upon their examination by the latter officer it becomes his duty to certify the balance arising thereon to the Secretary of the Navy. Id., sect. 273. The statute also provides that "the auditors charged with the examination of the accounts of the departments of war and of the navy shall keep all accounts of the receipts and expenditures of the public money in regard to those departments, and of all debts due to the United States or moneys advanced relative to those departments; shall receive from the Second Comptroller the accounts which shall have been finally adjusted, and shall preserve such accounts, with their vouchers and certificates; and record all requisitions drawn by the secretaries of those depart-

ments, the examination of the accounts of which has been assigned to them." Id., sect. 283.

When an account has thus been examined, passed upon, and the balance certified, it is *adjusted*, as well within the meaning of the section last quoted, as of sect. 957 of the Revised Statutes. The latter section, in part, provides that "when suit is brought by the United States against any revenue officer or other person accountable for public money, who neglects or refuses to pay into the treasury the sum or balance reported to be due to the United States, upon the adjustment of his account, it shall be the duty of the court to grant judgment at the return term, upon motion, unless the defendant in open court (the United States attorney being present) makes and subscribes an oath that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the accounting officers of the treasury and rejected; specifying in the affidavit each particular claim so rejected, and that he cannot then safely come to trial. If the court, when such oath is made, subscribed, and filed, is thereupon satisfied, a continuance until the next succeeding term may be granted." This section is referred to for the purpose of showing as well the importance attached to the final adjustment of accounts by the proper officers of the treasury, as the difficulty in going behind or disputing the correctness of such adjustment when made the basis of a suit instituted to recover the balance reported to be due the government.

We come now to sect. 886 of the Revised Statutes, upon the construction of which depends the solution of the question to which we have already referred. That section declares that "when suit is brought in any case of delinquency of a revenue officer, or other person accountable for public money, a transcript from the books and proceedings of the Treasury Department, certified by the register, and authenticated under the seal of the department, or, when the suit involves the accounts of the War or Navy Departments, certified by the auditors respectively charged with the examination of those accounts, and authenticated under the seal of the Treasury Department, shall be admitted as evidence, and the court trying the cause shall be authorized to grant judgment and award execution

accordingly. And all copies of bonds, contracts, or other papers relating to or connected with the settlement of any account between the United States and an individual, when certified by the register, or by such auditor, as the case may be, to be true copies of the originals on file, and authenticated under the seal of the department, may be annexed to such transcripts, and shall have equal validity and be entitled to the same degree of credit which would be due to the original papers, if produced and authenticated in court: *Provided*, that where suit is brought upon a bond or other sealed instrument, and the defendant pleads *non est factum*, or makes his motion to the court, verifying such plea or motion by his oath, the court may take the same into consideration, and, if it appears to be necessary for the attainment of justice, may require the production of the original bond, contract, or other paper specified in such affidavit."

This section embodies the provisions found in the second section of the act of March 3, 1797 (1 Stat. 512), providing more effectually for the settlement of accounts between the United States and receivers of public money, and the eleventh section of the act of March 3, 1817, relating to the prompt settlement of public accounts. 3 id. 367.

It will be observed that sect. 886 refers to "transcripts from the books and proceedings of the Treasury Department," as well as to "copies of bonds, contracts, or other papers relating to or connected with the settlement of any account between the United States and an individual." The former, certified and authenticated as required by the statute, "shall be admitted as evidence," while the latter, certified and authenticated in like manner "may be annexed to such transcript," and have "equal validity, and be entitled to the same degree of credit which would be due to the original papers, if produced and authenticated in court." Commenting upon similar language in the act of March 3, 1817, this court, in *Smith* v. *United States* (5 Pet. 300), which was a suit against a paymaster in the army for a balance alleged to be due to the government, said, that under the head of "a transcript from the books and proceedings of the Treasury Department" were included "charges of money advanced or paid by the department to the agent, and claims

suspended, rejected, or placed to his credit." These all appear, said the court, upon the "books" of the department; and the decision on the vouchers exhibited, and the statement of the amount due, constitute, in part, the "proceedings" of the treasury. The court, in that case, recognizes the transcript from the books and proceedings of the department as a document which shows the account of the government debtor, as finally adjusted by the proper officers, and as it appears upon the records of the department. Such adjusted accounts, says Mr. Chief Justice Taney, necessarily show the charges against as well as the credits of the disbursing officer. They "could not," said he, "be adjusted on the books in any other manner, and the transcript, or, in other words, the copy of the entire account, as it stands on the books (which must include debits as well as credits), are made evidence by the law. Nor do we see any reason for restricting the words of the act of Congress within narrower limits than the words plainly imply. The accounts are adjusted by public sworn officers, bound to do equal justice to the government and the individual. They are records of the proper departments, and are always open to inspection of the party interested." *Bruce* v. *United States*, 17 How. 437.

Unless, therefore, the transcript offered, as evidence, upon the trial below is certified by the proper officer, and authenticated under the department seal, to be "a transcript from the books and proceedings of the Treasury Department," it is not such a transcript as the statute makes evidence.

We are of opinion that the transcript offered is not certified and authenticated to be of that character which the statute declares shall be admitted as, in itself, evidence. The certificate of the deputy Fourth Auditor is that the "transcript" thereto annexed, that is, the statement and abstracts heretofore described, are "true copies of the originals on file" in his office. That is precisely such a certificate as the officer would make in reference to mere copies of bonds, contracts, or other papers relating to or connected with the final adjustment of the account, for the purpose of giving to such copies the same effect as would be accorded to the originals if produced and authenticated in court. If the papers offered, and excluded by the court below, constitute, in fact, the final adjustment of

Morris's accounts, the certificates should not have described them as copies of originals on file, but as transcripts of the books and proceedings of the department. The statute, for the convenience of the government in a certain class of suits against delinquent public officers, makes an alteration of the established laws of evidence. The government, by a statutory rule which the courts must enforce, denies to defendants in such suits the benefit of the recognized principles which, at common law, govern the proof of essential facts in issue, and it should not be permitted to claim an exemption from the fair and legitimate operation of that rule. It may be true, as the certificate of the deputy Fourth Auditor states, that the papers offered are true copies of some originals on the files of his office; for instance, of the original drafts of settlement. But it does not necessarily follow that they present an accurate or correct statement of the final settlement or adjustment of the accounts as shown on the books and in the record of the proceedings of the department. Such originals may never have become a part of the books and proceedings of the department, in the sense of the law, or within the meaning of our former decisions. *United States* v. *Buford*, 3 Pet. 12; *Smith* v. *United States*, 5 id. 292; *Cox* v. *United States*, 6 id. 172; *United States* v. *Jones*, 8 id. 375; *Gratiot* v. *United States*, 15 id. 336; *Hoyt* v. *United States*, 10 How. 109; *Bruce* v. *United States*, 17 id. 437. That the abstracts or statements offered and excluded may, upon their examination, seem to the court to be the final adjustment of Morris's accounts is not sufficient. Upon that question the court might be mistaken in any conclusion it should reach, or it may err in the inferences drawn from the items of the accounts. What the statute meant was, that the official certificate of the officer, charged with the examination of the accounts, should be of such character as to give the court, as well as the parties, an assurance that the transcript offered as evidence to support the claim of the government exhibits, in fact, the final adjustment of the accounts of the delinquent officer, as shown, not by mere copies of original papers on the files, but upon the books and records of the department.

This question, in a somewhat different form, arose in *Smith*

v. *United States*, *supra*. There, as here, the auditor certified that the transcripts offered in evidence were "true copies of the originals on file" in his office, and, in that form, the certificate narrowly escaped condemnation. The majority of the court, evidently with some hesitation, held the transcripts admissible in evidence upon the ground that the bill of exceptions stated that the documents, offered as evidence and excluded, purported to be transcripts "from the books and proceedings of the Treasury Department." Upon that point three of the judges dissented. The grounds of the dissent are stated in the opinion of the court. The minority held that the certificate could be regarded as referring only to papers the originals of which were on file; that the books of the department could not be said to be on file, nor were copies from them copies from originals within the meaning of the statute; that it was a copy from the books and proceedings in the Treasury Department which was made evidence, and not mere copies of papers, though on the files, on which the rough draft of settlement may have been entered.

The bill of exceptions does not bring the present case, upon this particular point, within the ruling in *Smith* v. *United States*. There is no statement in the bill here that the papers offered and excluded were transcripts from the books and proceedings in the treasury, but only that they constituted the "account of Miles H. Morris, as purser of the United States Navy, as certified by the Treasury Department." This language is not equivalent to that which the statute requires in order to make the transcript evidence, and we are not disposed to extend the rule announced in *Smith* v. *United States*. The statute is founded in justice as well as in the necessities of the government when compelled to institute suits against delinquent public officers. Its provisions are easily understood, and it is not at all difficult to meet the manifest object Congress had in enacting them. When the government desires, in suits against a delinquent officer accountable for public money, to use the final adjustment of his accounts as evidence, the certificate of the officer should show, not, necessarily, in the very words of the statute, but plainly, and not by mere inference, that the transcript offered is from the books and proceedings of the

department; in other words, that such transcript presents the account of the delinquent as finally adjusted by the proper officers of the government, and spread upon the records of the department.

Without stopping to consider other points raised by counsel in support of the ruling below, it is sufficient to say, that, for the reasons given, the court below did not err in excluding from the jury the transcripts offered by the government.

Judgment affirmed.

MR. JUSTICE SWAYNE and MR. JUSTICE BRADLEY dissented.

GOODMAN v. NIBLACK.

1. A., who had a contract with the United States, agreed with B., in 1847, that the latter should perform it, and that the profits should be equally divided between them. Thereupon they and C. executed an instrument in which the agreement was recited, and A., for the due fulfilment thereof, assigned the contract to C. as trustee. A controversy having arisen as to the amount due upon the contract, Congress, in 1870, authorized C. as such trustee to sue the United States therefor, and subsequently made an appropriation to pay the judgment which he recovered. *Held*, that as the assignment was thus recognized by the government, the parties to the agreement and those claiming under them are precluded from setting up that the contract was not assignable.
2. A. made in 1860 an assignment for the benefit of his creditors, which included all his rights, credits, effects, and property of every description. *Held*, that the assignment, although it covered whatever might be due to him under his contract with the government, was not within the prohibition of the act of Feb. 26, 1853 (10 Stat. 170, re-enacted in sect. 3477, Rev. Stat.), nor in violation of public policy.
3. *Spofford* v. *Kirk* (97 U. S. 484) and *Erwin* v. *United States* (id. 392) cited and examined.
4. Where a bill is filed to enforce a claim or lien upon a specific fund within reach of the court, and such of the defendants as are neither inhabitants of nor found within the district do not voluntarily appear, the Circuit Court has jurisdiction to adjudicate upon their right to, or interest in, the fund, if they be notified of the pendency of the suit by service or publication, in the mode prescribed by sect. 738 of the Revised Statutes.
5. In such a case, where it appears by the bill that certain non-residents are indispensable parties, and they are not made parties, the bill is bad on demurrer, and should be dismissed without prejudice.

APPEAL from the Circuit Court of the United States for the District of Indiana.

This was a bill in chancery filed by Charles Goodman against William E. Niblack, administrator *de bonis non* of Albert G. Sloo, deceased. A demurrer to it was sustained, and Goodman appealed.

The case is fully stated in the opinion of the court.

Mr. James C. Denny and *Mr. D. V. Burns* for the appellant.

Mr. F. W. Viehe for the appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

There came into the hands of Niblack, as administrator *de bonis non* of the estate of Albert G. Sloo, the sum of $150,000, and the complainant is the owner of a judgment against said Sloo for $31,344.44, recovered in the Supreme Court of the State of New York, on the twentieth day of January, 1855. The purpose of the present bill is to follow this money in Niblack's hands as a trust fund devoted by Sloo in his lifetime to the payment of that judgment. This trust arises, if it exist at all, out of a deed of assignment made by Sloo of all his property, rights, and credits to Benjamin H. Cheever and James Wiles, of the date of Feb. 3, 1860, for the benefit of all his creditors, but with some preferences, among which is the judgment. The sum above mentioned was received by Niblack as the share of Sloo's estate in a claim of over a million dollars recovered in the Court of Claims against the United States and paid by the government to Marshall O. Roberts and Edward N. Dickerson, in whose names the judgment was recovered. The history of this claim, which is necessary to an understanding of the case in hand, is this: —

The fourth section of the act of Congress of March 3, 1847, chap. 62 (9 Stat. 187), directed the Secretary of the Navy to contract with Sloo for the transportation of the mails of the United States from New York to New Orleans, Charleston, Savannah, Havana, and Chagres and back twice a month, at a compensation not to exceed the sum of $290,000. The mail was to be carried in steam vessels of a character described in the act, not less than five in number, to be constructed under

the supervision of officers of the navy, in such manner as to be easily converted into war steamers of the first class. Under this authority the Secretary and Sloo executed a written contract on the 20th of April of that year, for the construction of the ships and transportation of the mails at the sum of $290,000 per annum. On the 17th of August thereafter Sloo entered into an agreement with Marshall O. Roberts, George Law, Prosper M. Wetmore, and Edwin Croswell, by which they were taken into this contract with him, and agreed to build the vessels, and run them, and perform the obligations of Sloo to the government. He was to receive one-half of the net profits of the venture and the four persons named the other half. In order to the perfect working of this agreement, a tripartite instrument in writing was made, in which Sloo is called the party of the first part, and Roberts, Law, Wetmore, and Croswell the party of the second part, and George Law, Marshall O. Roberts, and Berres R. McIlvaine party of the third part, whereby, after reciting the agreement between the party of the first part and the party of the second part, the contract of Sloo is assigned to the party of the third part as trustees for the due execution of the agreement. This was signed by all the persons named.

The ships were built, and the mails carried for many years. By death and substitution, Marshall O. Roberts and Edward N. Dickerson became the surviving trustees under the agreement, and, as such, recovered in a controversy with the United States in the Court of Claims judgment for the sum of $1,031,000 as money due under the original contract with Sloo, which judgment was affirmed in this court and the money paid to them.

In the mean time, Sloo, who had become insolvent, executed in 1860 the general assignment to Cheever and Wiles, already mentioned. He died before the final payment of the money by the government to Roberts and Dickerson. Niblack was appointed his administrator.

These facts are all set out in the bill, and copies of the several contracts and assignments are filed as exhibits. Another averment of the bill is that the sum really due to Cheever and Wiles, as assignees of Sloo, out of the sum paid

by the government, was $182,000; that Cheever and Wiles received $37,000 of this money, and consented to the payment of the remaining $145,000 to Niblack under some arrangement not understood by the complainant. It is also alleged that all the other indebtedness of Sloo which might have been a claim on this fund under his assignment to Cheever and Wiles has been paid, and there remains no other claim on it than complainant's. It is also averred that Wiles and Cheever are not citizens of Indiana, and cannot be served with process, and are not made parties to the bill, and for the reasons above stated are not necessary parties.

The demurrer is, first, general, and, secondly, special as regards the failure to make Cheever and Wiles parties.

The general demurrer is maintained on the ground that the assignments made by Sloo are void by reason of the provisions of sect. 3477 of the Revised Statutes. These provisions were enacted by Congress in 1853 (10 Stat. 170), and were, therefore, not in force when Sloo made his contract with the government, or his agreement with Roberts, Law, and others. That agreement remains unaffected by them. They were in force, however, when he made the general assignment of all his effects to Cheever and Wiles, and as the complainant claims through it, and can probably succeed only in that way (because, as we are informed, the State court of Indiana has decided that the Statute of Limitations bars his claim as an ordinary debt), we must inquire whether that assignment is void under the act of Congress.

The statute has several times within the last few years received the consideration of this court. *United States* v. *Gillis*, 95 U. S. 407; *Spofford* v. *Kirk*, 97 id. 484; *Erwin* v. *United States*, id. 392.

It is understood that the Circuit Court sustained the demurrer under pressure of the strong language of the opinion in *Spofford* v. *Kirk*. We do not think, however, that the circumstances of the present case bring it within the one then under consideration, or the principles there laid down. That was a case of the transfer or assignment of a part of a disputed claim, then in controversy, and it was clearly within all the mischiefs designed to be remedied by the statute. Those mis-

chiefs, as laid down in that opinion, and in the others referred to, are mainly two: —

First, The danger that the rights of the government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction.

Second, That, by a transfer of such a claim against the government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts, or the Congress, as desperate cases, when the reward is contingent on success, so often suggest.

Both these considerations, as well as a careful examination of the statute, leave no doubt that its sole purpose was to protect the government, and not the parties to the assignment. *Erwin* v. *United States* (*supra*), decided at the same term as *Spofford* v. *Kirk*, is suggestive on this point. It was there held that the claim of a bankrupt against the United States passed by the assignment in the bankruptcy proceeding to his assignee, and that the latter, and not the original claimant, was the proper person to sue in the Court of Claims. "The passing of claims to heirs, devisees, or assignees in bankruptcy is not within the evil at which the statute aimed," said the court. The language of the statute, "all transfers and assignments of any claim upon the United States, or of any part thereof, or any interest therein," is broad enough (if such were the purpose of Congress) to include transfers by operation of law, or by will. Yet we held it did not include a transfer by operation of law, or in bankruptcy, and we said it did not include one by will. The obvious reason of this is that there can be no purpose in such cases to harass the government by multiplying the number of persons with whom it has to deal, nor any danger of enlisting improper influences in advocacy of the claim, and that the exigencies of the party who held it justified and required the transfer that was made. In what respect does the voluntary assignment for the benefit of his creditors, which is made by an insolvent debtor *of all his effects*, which must, if it be honest, include a claim against the government, differ from the assignment which is made in

bankruptcy? There can here be no intent to bring improper means to bear in establishing the claim, and it is not perceived how the government can be embarrassed by such an assignment. The claim is not specifically mentioned, and is obviously included only for the just and proper purpose of appropriating the whole of his effects to the payment of all his debts. We cannot believe that such a meritorious act as this comes within the evil which Congress sought to suppress by the act of 1853.

It is also to be remarked that the government had recognized Sloo's original assignment of his contract to Roberts, Law, and McIlvaine, as trustees, by permitting them to perform the contract and receive the pay under it for years; and when a dispute arose as to the sum due under that contract, Congress, by the act of July 14, 1870, very fully recognized the validity of that transfer.

That act is in these words: —

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the claim of the trustees of Albert G. Sloo, for compensation for services in conveying the United States mails by steamers, direct between New York and Chagres, in addition to the regular service required under the contract made between the said Albert G. Sloo and the United States be, and the same is hereby, referred to the Court of Claims; and the said court is hereby directed to examine the same, and determine and adjudge whether any, and if any, what, amount is due said trustees for said extra service, provided that the amount to be awarded by said court shall be upon the basis of the value of conveying other first-class freight of like quantity with the mails actually carried between the same points at the same time."

This is still further recognized by the appropriation to pay this judgment "to Marshall O. Roberts and E. N. Dickerson, surviving trustees of A. G. Sloo," found in chapter 3 of the Second Session of the Forty-fifth Congress. 20 Stat. 7.

The first agreement of Sloo, therefore, is unassailable.

His assignment to Cheever and Wiles, in 1860, conveyed only his interest in the profits of the contract which the parties in the first assignment were performing or had performed for the government.

The general assignment of Sloo, in 1860, gave Cheever and Wiles no right to assert a claim against the government. They could only deal with the trustees under the first assignment, and on them they had only the claim for net profits which came into their hands. Cheever and Wiles and the present complainant were neither of them capable of suing the United States in the Court of Claims, or of presenting the matter before the accounting officers of the government, and could give no valid or just acquittance to the government for any part of the claim.

We do not think the transfer to Cheever and Wiles, as trustees for Sloo's creditors, is forbidden by the act of 1853, or by any other principle of law or of public policy.

But we are of opinion that Cheever and Wiles are not only proper but necessary parties to this suit. The entire sum to which the estate of Sloo could possibly be entitled was assigned to them. The trust on which it was assigned remains unexecuted. They are charged with having received $37,000 of that fund. What have they done with it?

If, as alleged in the bill, there are no other debts of Sloo secured by the assignment, this sum in their hands should be accounted for before a decree is rendered against his administrator. They are charged with consenting to the payment to the administrator of the fund now sought in this suit. There may have been good reasons for it, and if not, they may be personally liable for it. The fund can only be subjected to the complainant's debt through these trustees. It is only in right of the assignment to them that he proceeds. They are living, and cannot be divested of this trust by any decree to which they are not parties. The administrator has a right, if a decree is rendered against him, to have it made effectual against them.

Notwithstanding the allegation of the bill that all the liabilities of the trust fund except the complainant's debt have been discharged, this may not be so; and it may be in the power of these trustees, and it may be their duty, if made parties to this suit, to show that there are others entitled to share in it. No decree against that fund can rightfully be made while they are not before the court.

This, however, need not defeat the jurisdiction of the court if the bill is amended by making them defendants.

This is a proceeding in equity to enforce a lien on the fund which is within reach of the court, and as the trustees and complainant have the requisite citizenship, sect. 738 of the Revised Statutes provides a remedy for inability to serve process by an order of publication. If they appear, the suit will proceed as usual. If they do not appear, the decree, so far as it affects the fund in the hands of Niblack, will bind them; and this is all that is necessary to give the court jurisdiction to grant the relief prayed for by the complainant.

If the decree of the Circuit Court had dismissed the case without prejudice for want of proper parties, we should have been bound to affirm it. But standing as it does now, it is a decision on the merits of the case and a bar to any other suit. It must, therefore, be reversed and remanded to that court. If the complainant shall ask leave to amend his bill by making Cheever and Wiles defendants, he should be permitted to do so and proceed with his case. If he does not do this, a decree should be entered dismissing the bill for want of these parties and without prejudice to any other suit on the merits. *Shields* v. *Barrow*, 17 How. 130; *Barney* v. *Baltimore City*, 6 Wall. 280; *House* v. *Mullen*, 22 id. 42; *Kendig* v. *Dean*, 97 U. S. 423.

The decree will be reversed, and the cause remanded for further proceedings in conformity with this opinion; and it is

So ordered.

GEORGE v. TATE.

1. Where the signature of a firm name to an instrument shows that it was intended to be the act of all the partners, effect must be given to it accordingly, although only one of them is named in the body of the instrument.
2. When, in an action at law upon his bond, the defendant sets up that it was procured from him by fraud, no evidence in support of the plea is admissible, except that which relates to the execution of the instrument.
3. A demand against the obligee, obtained by the defendant after notice of the assignment of the bond to the plaintiff, is not a matter of set-off.
4. The assignment of a judgment, and of all bonds and instruments which, during the progress of the suit wherein it was rendered, were taken in connection therewith, transfers to the assignee a bond given by the defendant, with surety, whereby he secured the release of his property which had been seized under an attachment issued in the suit.

ERROR to the Circuit Court of the United States for the District of Kansas.

This was an action by Samuel W. Tate upon a bond bearing date Sept. 19, 1872, executed to John J. Myers and William Green by the firm of M. B. George & Brothers as principal, and J. W. L. Slavens as surety. The bond was subject to the condition, —

"That whereas the said Myers & Green have heretofore commenced, and now have pending, a civil action in the District Court of Ellsworth County, State of Kansas, against said M. B. George & Brothers, to recover the sum of $8,509.50, and have also filed their affidavit according to law, for a writ or writs of attachment to issue for the property of said M. B. George & Brothers; and whereas writs of attachment have issued and are now in the hands of the sheriffs of those counties to which said writs of attachment have been directed; and whereas the said M. B. George & Brothers have property within the jurisdiction of said court, about to be attached under and by virtue of said writs of attachment; and whereas said Myers & Green have agreed and promised the said M. B. George & Brothers that they, Myers & Green, will recall the said writs of attachment upon their, M. B. George & Brothers, executing a bond with approved security to pay the amount of the judgment and costs which may be rendered in the said action against said M. B. George & Brothers.

"Now, therefore, if we, the foregoing named bounden parties, shall well and truly pay to Myers & Green the amount of the judgment and costs which may be rendered in the foregoing named action by said District Court in sixty days from the rendition thereof, then the foregoing bond to be void, otherwise to be and remain in full force and effect."

The petition avers that Myers & Green performed the conditions in the bond mentioned, that being indebted to Tate they assigned and transferred to him the bond and their claim and demand against George & Brothers, and that on the rendition of a judgment against that firm for $9,758 they assigned in writing it and the bond to him, together with all their right, title, and interest therein and thereto, and that the bond and judgment remain unpaid. At the time of the execution of the bond the obligees were partners doing business under the firm name of Myers & Green.

The defendants' answer admits the execution of the bond, but denies the other allegations of the petition, and sets up as a defence that they were induced to sign the bond by the false and fraudulent representations made to them by Green, and of the attorney of Myers & Green, that six hundred and seventy-five head of cattle, sold but not delivered to the purchasers by M. B. George & Brothers, had been attached in a suit against the latter by Myers & Green, and were then held by virtue of such attachment.

Slavens sets up as a further defence by way of set-off, that Myers & Green were indebted to the firm of Ferguson, Slavens, & Co., of which he was a member, in a sum larger than the judgment obtained by Myers & Green against M. B. George & Brothers, and that on the last of July, 1874, before he had any notice of the assignment to Tate, by Myers & Green, of the bond in suit, said firm of Ferguson, Slavens, & Co., for value, assigned to him, Slavens, their claim against Myers & Green; that he was still the owner thereof; that it was due and unpaid; and that Myers & Green were insolvent.

To these defences the plaintiff filed a general denial.

The assignments in the petition mentioned are as follows: —

"MYERS & GREEN
vs.
M. B. GEORGE & BROS.

"I, William Green, in consideration of $8,509.00 (eight thousand five hundred and nine dollars), to me paid by Samuel W. Tate, of Llano County, Texas, do hereby assign to the said S. W. Tate the within written instrument, and all my interest in the covenants and agreements therein contained. That I hereby assign, turn over, and convey to and for the benefit of S. W. Tate, of the county of Llano, State of Texas, all my right and interest in a certain suit now pending in the District Court of Ellsworth County, Kansas, wherein I, William Green, and J. J. Myers are plaintiffs, and M. B. George & Brothers are defendants.

"And I constitute the said S. W. Tate my attorney irrevocable, with full power at his own charge in my name to take all legal measures which may be necessary or proper for the recovery or enjoyment of the assigned premises, with power of substitution.

"Witness my hand and seal this first day of November, A.D. 1872.

"MYERS & GREEN,
By WM. GREEN.

"Executed in the presence of—
"G. A. MILLS.

"JOHN J. MYERS and WILLIAM GREEN, Copartners as MYERS & GREEN, Plaintiffs,
vs.
MOSES B. GEORGE, WILLIAM L. GEORGE, JAMES B. GEORGE, and JOHN E. GEORGE, Copartners as M. B. GEORGE & BROTHERS, Defendants.

"1874, May 14. Judgment against the said defendants, M. B. George & Brothers, in favor of said Myers & Green. Debt, $9,758.00; costs, $

"Whereas said Myers & Green, since the commencement of the above suit and before the said judgment, sold their demand against the defendants to Samuel W. Tate for a debt owned by Myers & Green to Tate, and said suit has been carried on in the name of Myers & Green to judgment, and the said judgment and the bonds and instruments connected therewith and taken in said suit by the plaintiffs from the defendants and their sureties belong to said Tate: Therefore we, the said Myers & Green, hereby, for value

received by us from said Tate, do sell, transfer, set over, and assign to the said Samuel W. Tate the said judgment, and all bonds and instruments taken therein and connected therewith during the progress of said suit, and all our right and title therein and thereto, with full power to said Tate to collect, sue the same, and to receipt therefor as fully as we or either of us could do. As witness our hands at Ellsworth, in the State of Kansas, this eighteenth day of May, A.D. 1874.

"MYERS & GREEN."

There was a judgment for the plaintiff for $12,203.31. The defendants thereupon sued out this writ, and assign for error that the court below erred, —

1. In permitting the plaintiff to read in evidence the written assignment dated Nov. 1, 1872, signed "Myers & Green, by Wm. Green."

2. In refusing to allow the defendants to prove that they were induced to execute the bond sued on by the false and fraudulent representations of Myers & Green and their agents and attorneys.

3. In instructing the jury that "the assignment of Nov. 1, 1872, by Green to Tate, transferred, under the evidence in this action, the bond sued on in this case, with the right of Tate to sue for Green's interest therein."

4. In instructing the jury that "if Slavens, before the assignment to him of Ferguson, Slavens, & Co.'s claim against Myers & Green, had notice of the assignment of the bond in suit to Tate, you will disallow the defendants' so-called set-off."

5. In instructing the jury that "if Slavens had such information or knowledge of the assignment as would be sufficient to put any reasonable man upon inquiry, when such inquiry, reasonably followed up, would have led to an ascertaining of the truth, he had sufficient notice of such assignment."

6. In instructing the jury that "if the firm of Myers & Green, on the eighteenth day of May, 1874, transferred the judgment and bond by a written assignment, and in such assignment recited that they had theretofore sold the demand against George & Brothers to Tate, and that the bonds connected therewith belonged to Tate, then any notice to Slavens, after such sale, of such sale would prevent the set-off

in this action, provided such notice was before he obtained the set-off."

7. In instructing the jury that "an assignment of the claim in suit against George & Brothers, or an assignment of the judgment rendered thereon, would also transfer the bond sued on in this action."

8. In instructing the jury that "if the defendant Slavens, before the assignment to him of the claim of Ferguson, Slavens, & Co., had notice of the assignment to Tate of the Myers & Green claim against George & Brothers, you will not allow him or any of the defendants any set-off whatever."

9. In refusing to instruct the jury that "the interest of said Green in said demand has not been proved. The interest of partners in the property of the firm depends on the condition of the accounts between the partners, and the mere statement that Myers & Green were equal partners in business does not show what the interest of either may be in any particular portion of the property."

Mr. Nelson Cobb for the plaintiffs in error.

Mr. John K. Cravens, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The errors assigned in this case relate to three subjects:—

The admission in evidence by the court upon the trial below of the instrument dated Nov. 1, 1872;

The refusal by the court to permit evidence to be given of fraud by the defendant in error, in procuring from the plaintiffs in error the bond upon which the judgment below was recovered;

And the instructions given by the court to the jury touching the set-off claimed by the plaintiffs in error.

These several topics will be separately considered.

It was in proof that the firm of Myers & Green were largely indebted to Tate. He applied to Myers for payment. Myers said they had a claim against George & Brothers then in suit. He requested Tate to "go up and see Billy Green," and added, "he will let you have the claim against George & Brothers." Tate went to Green, and Green had the instrument in question drawn, and after its execution delivered it to

Tate. Green further agreed that the judgment in the pending suit should be assigned to Tate as soon as it was recovered.

Tate subsequently saw Myers and showed him the assignment. He said it was "all right," and Tate thereupon gave up to him the notes of Myers & Green to the amount of the claim against George & Brothers.

The bond was given to prevent the execution of a writ of attachment issued for the seizure of the property of George & Brothers, to secure the payment of any judgment Myers & Green might recover against them. It was conditioned for the payment of such judgment.

Viewing the transaction in the light of this evidence, it cannot be doubted that it was the intention of both parties that the bond should be transferred to Tate, and we think that intent was made effectual. The difficulty, so far as there is any, has arisen from the unskilfulness of the draftsman of the instrument. The assignment could have been made by one of the partners, and he could have made it by parol. *Jones* v. *Guaranty & Indemnity Company*, 101 U. S. 622; Story, Partn., sect. 101. The signature of the firm name shows that the instrument was intended to be the act of both partners, and effect must be given to it accordingly. This can be done upon settled legal principles and analogies.

If a promissory note be drawn, "I promise to pay," &c., and is signed by more than one person, it is the joint and several note of all who sign it. *Clerk* v. *Blackstock*, 1 Holt, 474: *Hunt, Adm'r*, v. *Adams*, 5 Mass. 358; s. c. 6 id. 519.

If one party only be named as obligor in the body of a bond, and others sign it also, all are bound. In no other way can any effect be given to the signatures of those not so named. The intent is clear, and that is sufficient. *Parks* v. *Brinkerhoff*, 2 Hill (N. Y.), 663; *Perkins* v. *Goodman*, 21 Barb. (N. Y.) 228.

A bond to B.'s executors, B. being alive, is a bond to B. *Langdon* v. *Goole*, 3 Lev. 21.

In *Simpson* v. *Henderson* (1 Moo. & M. 300), a written contract stipulated that a ship should be ready to take freight on board "*forthwith*." Parol evidence was admitted to show the surrounding circumstances when the contract was made.

Lord Tenterden said: "The word 'forthwith,' indeed, in strictness, means immediately; but it is plain this cannot be the construction to be affixed to it here. It was known that she required some repairs; at least, to be coppered, and some time must be allowed for that." He left it to the jury to say whether, under the circumstances, the vessel had been made ready within a *reasonable time.*

"Debt on an obligation conditioned to pay £7, by 2*s.* a week until the £7 were paid, and if he failed of the payment of the 2*s.* at any of the days wherein it ought to be paid, the obligation to be void, or else to remain in full force. The defendant pleads that he did not pay the 2*s.* on one of the days wherein it ought to be paid. The plaintiff demurs. . . . The court held that the condition should be taken distributively, by referring particulars to particulars, viz. that if he paid the £7 the obligation should be void; but if he failed of paying the 2*s.* at any of the days, it should be in full force; to which the rest agreed; for the obligation shall not be of no effect if by any means it may be made good." *Vernon* v. *Alsop*, 2 Lev. 77. It has been said by an eminent writer that "words are the counters of the wise and the money of the unwise. Their office is to symbolize ideas. The intent of the parties is the contract, and whenever that is ascertained, however in artificially expressed, it is the duty of courts to give it effect.

As between Myers & Green and Tate, the title of Tate was good by estoppel. The consideration which passed from him to them made it so.

A title to real estate thus acquired is effectual either for attack or defence in an action of ejectment. *Dickinson* v. *Colgrove*, 100 U. S. 578.

The court below committed no error in this connection.

Proof of fraudulent representations by Myers & Green, beyond the recitals in the bond, to induce its execution by the plaintiff in error, was properly rejected.

It is well settled that the only fraud permissible to be proved at law in these cases is fraud touching the execution of the instrument, such as misreading, the surreptitious substitution of one paper for another, or obtaining by some other trick or device an instrument which the party did not intend to give.

Hartshorn et al. v *Day*, 19 How. 211; *Osterhout* v. *Shoemaker and Others*, 3 Hill (N. Y.), 513; *Belden* v. *Davies*, 2 Hall (N. Y.), 433; *Franchot* v. *Leach*, 5 Cow. (N. Y.) 506. The remedy is by a direct proceeding to avoid the instrument. *Irving* v. *Humphrey*, 1 Hopk. (N. Y.) 284.

The evidence was properly rejected for another reason.

Where a party reaps the benefit which the bond gives in such cases, and is called upon to respond, he is not permitted to repudiate the obligation he has assumed.

In a case not unlike this Judge Story said: "The question is not new, and I am entirely satisfied that where the claimant voluntarily accepts a delivery on bail, it is an estoppel of his right to contest the validity of the security. He accepts or not at his pleasure, and it would be grossly inequitable if he might lie by until the close of the cause, receive and use the property, and then, by detecting an error in the bond, set the whole judgment of the court at defiance." *The Brig Struggle*, 1 Gall. 475. See also Bigelow, Estoppel, p. 206, and *post*, and 2 Whart. Evidence, sect. 1039, and the authorities cited by each author.

The instructions as to the set-off or counter-claim were as favorable to the plaintiffs in error as they had a right to ask. The jury, upon the evidence, found against them. With this result, there being no error of law involved, this court has nothing to do.

It is insisted that the court erred in instructing the jury that "an assignment of the claim in suit against George & Brothers, or an assignment of the judgment rendered thereon, would also transfer the bond sued upon in this action."

In this there was no error. The instruction was in exact conformity to the law upon the subject. *Bowdoin* v. *Colman*, 6 Duer (N. Y.), 182; *Craig* v. *Parkis*, 40 N. Y. 181; *Claflin* v. *Ostrom*, 54 id. 581; *Pattison* v. *Hull*, 9 Cow. (N. Y.) 747; *Hosmer* v. *True*, 19 Barb. (N. Y.) 106.

All the assignments of error are without merit.

Judgment affirmed.

WILSON v. MCNAMEE.

1. An objection not taken in the court below cannot be considered here.
2. The pilot laws of the State of New York are not in conflict with the Constitution of the United States. *Ex parte McNiel* (13 Wall. 236) and *Cooley* v. *Board of Wardens of Port of Philadelphia* (12 How. 299) cited and reaffirmed.
3. The pilot may recover pilotage, although his services were tendered to, and refused by, the master of the vessel, when she was without the jurisdiction of the State.

ERROR to the Court of Appeals of the State of New York.

McNamee tendered his services as a licensed Sandy Hook pilot to conduct the schooner "E. E. Racket" by way of Sandy Hook to the port of New York. He was the first that offered his services. The tender was made at sea, about fifty miles from that port. The vessel was from a foreign port, sailing under register, and drew nine feet of water. The master refused to accept the services, and came into port without a pilot. McNamee demanded the compensation allowed by the local State law, and, payment having been refused, brought this suit and recovered judgment in the District Court of the city of New York for the First Judicial Circuit against Wilson, the consignee of the schooner. The case was thereupon removed by appeal to the proper Court of Common Pleas, and subsequently to the Court of Appeals of the State. Those courts successively affirmed the judgment. Wilson sued out this writ.

The laws of New York on the subject of pilotage contain, among other provisions, the following: —

"All masters of foreign vessels, and vessels from a foreign port, and all vessels sailing under register, bound to or from the port of New York, by the way of Sandy Hook, shall take a licensed pilot; or, in case of refusal to take such pilot, shall himself, owners or consignees, pay the said pilotage, as if one had been employed; and such pilotage shall be paid to the pilot first speaking or offering his services as pilot to such vessel."

The fourth section of the act of Congress approved Aug. 7, 1789 (1 Stat. 54), declares that, —

"All pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress."

This enactment will also be found in sect. 4235 of the Revised Statutes.

The proviso to the second section of an act of Congress of Feb. 2, 1867 (14 Stat. 412), is in these words: —

"Nothing in this act contained, or in the act of which it is amendatory, shall be construed to annul or affect any regulations established by the existing laws of any State requiring vessels entering or leaving a port in such State to take a pilot duly authorized by the laws of such State, or of a State situate upon the waters of the same port."

Mr. James S. Stearns, for the plaintiff in error.

The court declined hearing counsel for the defendant in error.

MR. JUSTICE SWAYNE, after stating the case, delivered the opinion of the court.

The only point argued here was the validity of the pilot law of New York with reference to the Constitution of the United States.

At the close of the opening argument of the learned counsel for the plaintiff in error, we announced that the affirmative of the question thus presented was so well settled by the repeated adjudications of this court, that we had no desire to hear the counsel for the defendant in error upon the subject.

Thereafter, the counsel who had been heard submitted a memorandum, in which he called our attention particularly "to the tenth point of the brief of the plaintiff in error, namely, that the tender took place outside of the jurisdiction of the State of New York." He added: "This question has never yet been passed upon by this court in either of the other pilot cases."

Our opinion will be confined to that subject.

There are several answers to the suggestion.

1. The objection does not appear to have been taken in the Circuit Court, and cannot, therefore, be considered here. *Edwards* v. *Elliott*, 21 Wall. 532.

2. A vessel at sea is considered as a part of the territory to which it belongs when at home. It carries with it the local legal rights and legal jurisdiction of such locality. All on board are endowed and subject accordingly. The pilot, upon his boat, had the same authority from the laws of New York to tender and demand employment, and the same legal consequences, under the circumstances, followed the refusal of the master as if both vessels had then been *infra fauces terræ*, where the municipal jurisdiction of the State was complete and exclusive. The jurisdiction of the local sovereign over a vessel, and over those belonging to her, in the home port and abroad on the sea, is, according to the law of nations, the same. Dana's Wheaton, p. 169, sect. 106; 1 Kent, Com. 27; Vattel, bk. 1, c. 19, sect. 216; 2 Rutherford's Inst., bk. 2, c. 9, sects. 8, 19.

The principle here recognized is, of course, subject to the paramount authority of the Constitution and laws of the United States over the foreign and inter-state commerce of the country, and the commercial marine of the country engaged in such commerce, and subject also to the like power of Congress "to define and punish piracies and felonies committed on the high seas and offences against the law of nations." See *Ex parte McNiel*, 13 Wall. 236.

Speaking of the universal law of reason, justice, and conscience, of which the law of nations is necessarily a part, Cicero said: "Nor is it one thing at Rome and another at Athens, one now and another in future, but among all nations it is, and in all time will be, eternally and immutably the same." Lactantius Inst. Div., bk. 7, c. 8.

3. Conceding that the pilot laws of the several States are regulations of commerce, Mr. Justice Story said, "They have been *adopted* by Congress, and without question are controllable by it." 2 Story, Const., sect. 1071.

Mr. Chief Justice Marshall, in *Gibbons* v. *Ogden*, said: "When the government of the Union was brought into exist-

ence, it found a system for the regulation of pilots in force in every State. The act which has been mentioned adopts this system, and gives it the same validity as if its provisions had been specially made by Congress." 9 Wheat. 1, 207. The long-continued silence of Congress, with its plenary power, in the presence of such legislation by the States concerned, is itself an implied ratification and adoption, and is equivalent in its consequences to an express declaration to that effect. *Atkins* v. *The Disintegrating Company*, 18 Wall. 272.

The several acts of Congress bearing on the subject are fully referred to in *Ex parte McNiel*, *supra*. In that, and in the earlier and more elaborate case of *Cooley* v. *Board of Wardens of Port of Philadelphia* (12 How. 299), this subject, in all its aspects, was so fully considered that further remarks on the present occasion are deemed unnecessary.

Judgment affirmed.

EDWARDS v. UNITED STATES.

A. sued out a writ of error returnable to the October Term, 1877. The return was duly made, the transcript of the record lodged in the clerk's office in September of that year, and a citation issued and served in time; but by an oversight of A.'s counsel no fee-bond was given. The cause was not docketed. In September, 1878, the bond was filed and the cause then docketed, no motion to docket and dismiss having in the mean time been made. *Held*, that a motion made at the present term to dismiss the writ must be denied.

MOTION to dismiss a writ of error to the Circuit Court of the United States for the Western District of Michigan.

The facts are stated in the opinion of the court.

Mr. J. W. Stone and *Mr. M. J. Smiley* in support of the motion.

Mr. H. F. Severens, *contra*.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The writ of error in this case was returnable to the October Term, 1877. The return was duly made, and a transcript of

the record lodged in the office of the clerk of this court on the 27th of September, 1877. A citation in due form was issued and served in time. By an oversight of the counsel for the plaintiff in error no fee-bond was given, and the cause was not docketed during the term of 1877. No motion to docket and dismiss was ever made, and on the 3d of September, 1878, the attention of counsel having been called to the omission of the security for costs, an acceptable bond was given and the cause docketed in form. Under these circumstances we are not inclined to dismiss the suit. We are aware that in some of the cases it has been said that a writ of error or an appeal becomes inoperative if a transcript is not filed and the cause docketed during the term to which it is made returnable, but this has always been in cases where a return had not been made and a transcript had not been filed within the time. The language should, therefore, be construed in connection with those facts. In *Owings* v. *Tiernan's Lessee* (10 Pet. 447) and *Van Rensselaer* v. *Watts* (7 How. 784), leave was given to docket the cause after the term, when the transcript had been filed in time, but through inadvertence a fee-bond had not been given and there had not been in the mean time a motion to docket and dismiss. That is this case. In *Selma & Meridian Railroad Co.* v. *Louisiana National Bank* (94 U. S. 253), the transcript was filed in time, but the cause not docketed because of a failure to furnish a fee-bond. In this state of things, and while the default continued, a motion to docket and dismiss was made under rule 9, and granted. At the next term the appellant appeared, and moved to set aside the order of dismissal and docket his appeal. This we refused, under the circumstances of that case. After a cause has been docketed and dismissed it cannot be again docketed unless by order of the court. Such is the rule. If a return is made and the transcript deposited in the clerk's office in time, our jurisdiction is kept alive. The docketing of the cause after that is mere procedure, and if unreasonably delayed, the parties may be subjected to the consequences of a failure to prosecute a suit, which rest largely in the discretion of the court when not provided for by rules. Rule 9 is of that class.

In this case it is abundantly shown that the omission to give

the bond was through inadvertence and without any intention to delay the due prosecution of the suit. No harm has been done, save possibly a short extension of the time for bringing on the hearing. The defendants in error have delayed their motion to dismiss until a new writ is barred by lapse of time.

Motion denied.

BENNETT v. RAILROAD COMPANY.

The owner or occupant of land who induces or leads others to come upon it for a lawful purpose is liable in damages to them — they using due care — for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and he negligently suffered it to exist, without giving timely notice thereof to them or the public.

ERROR to the Circuit Court of the United States for the District of Kentucky.

The case is stated in the opinion of the court.

Mr. Walter Evans for the plaintiff in error.

There was no opposing council.

MR. JUSTICE HARLAN delivered the opinion of the court.

This was an action by John Bennett against the Louisville and Nashville Railroad Company, commenced by a petition framed in accordance with the Kentucky Code of Practice in civil cases. Its object is to recover damages for personal injuries alleged to have resulted from negligence or want of proper care on the part of the agents, servants, and employés of the defendant, a corporation engaged in the business of transporting freight and passengers for hire. The petition was twice amended, and a demurrer thereto having been sustained, judgment was given for the defendant. After judgment the plaintiff died, and the action was revived in this court in the name of Martha J. Bennett, his personal representative.

The controlling question before us is whether the amended petition makes out a cause of action against the company.

Under its averments and for the purposes of this case, as presented, we must assume the existence of the following facts: —

In the year 1876, the deceased was a passenger on the cars of the defendant from Vernon to Danville, in the State of Tennessee. At the last-named place he left the train for the purpose of taking the steamer "Rapidan," which belonged to the Evansville and Tennessee River Packet Company, and was engaged in the navigation of that river. Its customary place of landing for Danville and immediate vicinity, on that side of the river, was at a wharf-boat, moored at or against a lot within a few hundred yards of the railroad station. Between the railroad company and the packet company there was, at the time, an arrangement or contract, by the terms of which each party enjoyed a community of interest (in what proportion it is not stated) in the freight and passenger traffic at that point. Each was at liberty to sell through tickets, and give through bills of lading, over both lines. The wharf and the lot were owned by, and were under the exclusive control of, the railroad company. The former was used by the company and the public for storing freight, and as a convenient place for the landing of steamboats navigating the river. The lot had been purchased and used by the company in connection with the wharf-boat, for the purpose of facilitating its passenger business, as well as for the receipt and discharge of freight coming from the river to the railroad, or going from the railroad to the river. For such use of its wharf-boat and landing the railroad company received benefit and compensation. To further facilitate its freight and passenger business, the railroad company had erected and maintained upon such lot, in front of the wharf-boat, a large open shed-depot, about two hundred and forty feet in length and twenty feet in width, in the centre of which was a room or apartment containing an engine, which was used for the purpose of hauling freight to and from the river by means of flats or cars drawn by ropes on railroad tracks. These cars were pulled up the bank into spaces (of which there were four, two on each side of the engine-room) left in the floor of the depot. These spaces or hatch-holes, as they are called, were

about eleven feet in extent, and reached from the river side of the depot nearly to its centre.

The customary, and indeed the only safe, available, and convenient route for persons passing from Danville to the steamboat landing was along a plank-way (on each side of which the ground was low and marshy), about six hundred yards in length, extending from Danville along a side-track of the railroad, and terminating at or near the northern end of the depot; thence up a flight of steps to the depot floor, and across the floor of the depot towards its southern end; thence down a flight of steps, located between two of the hatch-holes, to the wharf-boat, over a macadamized or gravel way. The latter and the plank-way were constructed by the railroad company for the convenience of those going upon business to or from the steamboat landing. The custom of travellers passing between the railroad station at Danville and the steamboat landing to use as a foot-way the plank-road, the depot floor, and the macadamized way leading to the wharf-boat, was not only a necessary one, but was known to and permitted by that company. There was no path or safe or convenient way around the shed-depot to the wharf.

Such was the situation when the deceased reached Danville by the cars of the company. He stopped at a hotel to await the coming, that night, of the steamer "Rapidan," whose usual hours of arrival at the landing were known to the railroad company. Some time after midnight the steamer reached the vicinity of the landing, and, by whistle, signalled for landing at the wharf-boat. Deceased started from the hotel for the steamboat, for the purpose of prosecuting his journey, taking with him a lighted lantern. He went upon the plank-way leading to the shed-depot, having been informed by the landlord that that was the proper route to take. He had proceeded but a short distance when the wind extinguished the light, and fearing the boat would immediately depart, and being able to see the plank-way, he proceeded to the depot (which was unlighted), and, passing up the steps at its northern end, he attempted to cross the floor in the direction of the steps, at the southern end, leading down to the macadamized or gravel way which we have described. He was unaware of the exist-

ence of the openings or hatch-holes in the depot floor, or of any other obstruction or danger in his path, and, although using due care, he fell through one of the hatch-holes (which had been left uncovered and unguarded for some time before), down, a distance of at least five feet, upon the cross-ties and rails beneath. By the fall his left ankle and foot were broken and crushed, causing severe and permanent injury, attended by sickness and long confinement to his bed. The demurrer concedes that the company was aware as well of the condition of the hatch-holes in the depot floor, as that such condition was unsafe and dangerous to the travelling public.

The right to revive this action in the name of the personal representative of Bennett seems to be clear under the laws both of Kentucky and Tennessee, by each of which States the defendant was incorporated, and in the latter of which occurred the injuries for which damages are claimed. Kentucky Gen. Stat. 179; Tennessee Code, sect. 2846.

The facts disclosed by the pleadings, and by the demurrer conceded to exist, seem to bring this case within the rule — founded in justice and necessity, and illustrated in many adjudged cases in the American courts — that the owner or occupant of land who, by invitation, express or implied, induces or leads others to come upon his premises, for any lawful purpose, is liable in damages to such persons — they using due care — for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public, or to those who were likely to act upon such invitation. *Railroad Company* v. *Hanning*, 15 Wall. 649; *Carleton & Others* v. *Franconia Iron & Steel Co.*, 99 Mass. 216; *Sweeny* v. *Old Colony & Newport Railroad Co.*, 10 Allen (Mass.), 368; Wharton, Negligence, sects. 349–352; Cooley, Torts, 604–607, and authorities cited by those authors. The last-named author says that when one "expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit."

The rule is also illustrated in many cases in the English courts, some of which it may be well to examine. One, referred to by this court in *Railroad* v. *Hanning*, is *Corby* v. *Hill*, 4 C. B. N. S. 562. That was an action for an injury sustained by the plaintiff while travelling upon a private way leading from a turnpike road to a certain building, and over which parties having occasion to visit such building were likely to pass, and were accustomed to pass, by leave of the owners of the soil. The defendant negligently obstructed the way by placing thereon certain materials without giving notice or warning of the obstruction by light or other signal, and by reason thereof the plaintiff's horse was driven against the obstruction and injured. One of the pleas was that the defendant had placed the materials on the road by the license or consent of the owners of the soil. Upon the argument of the case, counsel for the defendant contended that the owners of the soil, and consequently, also, any person having leave or license from them, might, as against any other person, using the way by the like leave and license, place an obstruction thereon without incurring responsibility for injury resulting therefrom, unless in the case where an allurement or inducement was held out to such other person to make use of the way. Upon the general question, as well as in response to this argument, Cockburn, C. J., said: "It seems to me that the very case from which the learned counsel seeks to distinguish this is the case now before us. The proprietors of the soil held out an allurement whereby the plaintiff was induced to come upon the place in question; they held out this road to all persons having occasion to proceed to the asylum as the means of access thereto. . . . Having, so to speak, dedicated the way to such of the general public as might have occasion to use it for that purpose, and having held it out as a safe and convenient mode of access to the establishment, without any reservation, it was not competent for them to place thereon any obstruction calculated to render the road unsafe, and likely to cause injury to those persons to whom they held it out as a way along which they might safely go. If that be so, a third person could not acquire the right to do so under their license or permission." In the same case, Williams, J., said: "I see no reason why the

plaintiff should not have a remedy against such a wrong-doer, just as much as if the obstruction had taken place upon a public road. Good sense and justice require that he should have a remedy, and there is no authority against it." Willes, J., remarked: "The defendant has no right to set a trap for the plaintiff. One who comes upon another's land by the owner's permission or invitation has a right to expect that the owner will not dig a pit thereon, or permit another to dig a pit thereon, so that persons lawfully coming there may receive injury."

Another case, often cited, is *Chapman* v. *Rothwell*, 1 El., B. & E. 168. The declaration there charged that the defendant was in possession and occupation of a brewery, office, and passage leading thereto from the public street, used by him for the reception of customers and others in his trade and business as a brewer. The passage was the usual and ordinary means of ingress and egress to and from the office, from and to the public street. The defendant negligently permitted a trap-door in the floor of that passage to be and remain open, without being properly guarded and lighted. The plaintiff's wife had been to the brewery office as a customer in the defendant's business, and was walking along the passage on her return to the public street, when she fell through the trap-door and was injured and killed. Upon the argument, counsel for defendant insisted that no facts appeared showing it to be the duty of the defendant to keep the trap-door closed. To this Erle, J., replied, with the sanction of Lord Campbell, C. J., "If you invite a customer to come to your shop, and leave a pitfall open, or a large iron peg in the part of the floor over which the customer is likely to tread, is not that a duty and a breach, if accident ensues?" The court there drew a distinction between the case of a mere visitor, as in *Southcote* v. *Stanley* (1 H. & N. 247), and a customer, who, as one of the public, is invited for the purposes of business carried on by the owner or occupier of the premises.

In *Indermaur* v. *Dames* (Law Rep. 1 C. P. 274, and 2 id. 313), the court, referring to the class of persons who visit premises upon business which concerns the occupier, and upon his invitation, express or implied, said that it was settled

law that a visitor of that class, "using reasonable care on his part for his own safety, is entitled to expect that the occupier shall, on his part, use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact."

In *Lancaster Canal Co.* v. *Parnaby*, 11 Ad. & El. 230, which was the case of a company making a canal for their profit, and opening it to the public use on payment of tolls, it was held by the Exchequer Chamber that the common law, in such a case, imposed a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they kept it open for the public use of all choosing to navigate it, that they may navigate it without danger to themselves or property.

The same principle was applied by the Exchequer Chamber in *Gibbs* v. *Trustees of the Liverpool Docks*, 3 H. & N. 164. That was an action by the owners of a ship to recover for an injury done to the cargo by reason of the ship, when entering, having struck a bank of mud carelessly and negligently left in and about the entrance to the dock. The defendants were not individually profited by the operations of the company of which they were trustees, but, by statute, were bound, as such trustees, to apply the tolls received in maintaining the docks, and in paying the debt contracted in making them. The court, speaking by Coleridge, J., held, that whether the defendants received the tolls for a beneficial or a fiduciary purpose, the knowledge, upon their part, that the entrance to the dock was dangerous, imposed upon them the duty of closing the dock against the public, as soon as they became aware of its unsafe condition; that they had no right, with a knowledge of its condition, to keep it open and to invite the vessel in question into the peril which they knew it must encounter, by continuing to hold out to the public that any ship, on the payment of the tolls to them, might enter and navigate the dock.

The judgment was affirmed upon full consideration in the House of Lords, 11 H. L. Cas. 686. In the opinion, there delivered by Mr. Justice Blackburn, on behalf of all the judges who heard the argument, among whom were Lords Cranworth, Wensleydale, and Westbury, it was said, "For a body corporate never can either take care or neglect to take care, except through its servants; and (assuming that it was the duty of the trustees to take reasonable care that the dock was in a fit state) it seems clear that if they, by their servants, had the means of knowing that the dock was in an unfit state, and were negligently ignorant of its state, they did neglect this duty and did not take reasonable care that it was fit."

We forbear further citation of authorities. It is clear that the rule which obtains in the English courts is in harmony with that generally recognized in the courts of this country.

We entertain no doubt that upon the case, as made by the pleadings, the railroad company is liable in damages. As the deceased did not purchase from the railroad company a through-ticket, but only a ticket, over its line, from Vernon to Danville station, it may be argued that the relation of carrier and passenger, which existed between the company and him, terminated when he left the train at Danville station, and, consequently, that there was no breach of the company's contract of transportation. But there was, nevertheless, a breach of legal duty or obligation for which, as property owner, the railroad company is responsible.

It cannot be pretended that Bennett, at the time he was injured, was, in any sense, a trespasser upon the premises of the company. Nor is this case like many, cited in the books, of mere passive acquiescence by the owner in the use of his premises by others. Nor is it a case of mere license or permission by the owner, without circumstances showing an invitation extended, or an inducement, or, in the language of some of the cases, an allurement, held out to him as one of the general public. It is sometimes difficult to determine whether the circumstances make a case of invitation, in the technical sense of that word, as used in a large number of adjudged cases, or only a case of mere license. "The prin-

ciple," says Mr. Campbell, in his treatise on Negligence, "appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it."

As each case must largely depend upon its special circumstances, we shall not attempt to lay down a general rule upon the subject. It is quite sufficient to say that no difficulty of discrimination exists in the case before us. This is the case of a traveller, going upon a way which had been constructed and was maintained by a railroad company, in part for its own benefit and profit, to be used by all, without distinction, who desired, for purposes of business, to pass to and from the company's wharf-boat, moored at an established landing upon a public navigable river. The deceased, when injured, was using the premises for some of the very purposes for which they had been appropriated, and to which they had been, in a sense, dedicated by the owner. They were so situated, with reference to the river, and were so occupied and controlled by the company as not only to invite their use by the public, but practically to compel those having business at the river landing to abandon such business, or, in its prosecution, to pass over the route through the shed-depot. It was, therefore, the plain duty of the company to take such precautions, from time to time, as ordinary care and prudence would suggest to be necessary for the safety of those who had occasion to use the premises for the purposes for which they had been appropriated by the company, and for which, with its knowledge and permission, it was commonly used by the public.

We are all of opinion that the pleadings state facts sufficient to require an answer from the defendant. It is a case peculiarly for the consideration of a jury of practical men, who, under proper instructions, can best ascertain to what extent, if at all, under the circumstances actually existing, the railroad company was negligent in the discharge of any duty or obligation, imposed by the law, and how far, if at all, the deceased was wanting in due care upon the occasion when he was injured.

To guard against misapprehension, it is proper to remark also that we must not be understood as making the plaintiff's

right of recovery dependent upon proof of every single fact averred in the pleadings, or which has been recited in this opinion. We have considered the case in the light of the facts, as averred, and, by the demurrer, conceded to exist. Upon the trial, after issue joined, the court will have no difficulty, in view of what we have said, in determining whether the case, as actually presented to the jury, shows a breach of duty or legal obligation upon the part of the railroad company, for which it may be liable in damages.

The judgment will be reversed, and the cause remanded with directions to overrule the demurrer, and for further proceedings in conformity with this opinion; and it is

So ordered.

SPRINGER v. UNITED STATES.

1. Certain lands of A. were distrained and sold by reason of his refusal to pay the income tax assessed against him under the act of June 30, 1864 (13 Stat. 218), as amended by the act of March 3, 1865 (id. 469), he having no goods or chattels known to the proper officers out of which the tax and penalty could have been made. The United States became the purchaser of the lands, received a deed therefor, and brought ejectment against him. *Held*, that he cannot raise the question here that the deed, inasmuch as it refers to the act of March 30 instead of that of June 30, should, on the trial, have been excluded from the jury, as that objection to its admissibility in evidence was not made in the court of original jurisdiction.
2. Where the collector acted in good faith, it was not improper for him, in the exercise of his discretion, to sell as an entirety the lands, consisting of two town lots which were enclosed and occupied as a single homestead, a dwelling-house being upon one of them and a barn on the other. The State statute under which they were separately assessed has no application to his proceedings.
3. Congress, in the exercise of its power "to lay and collect taxes, duties, imposts, and excises," may, to enforce their payment, authorize the distraint and sale of either real or personal property. The owner of the property so distrained and sold is not thereby deprived of it without due process of law.
4. Direct taxes, within the meaning of the Constitution, are only capitation taxes as expressed in that instrument, and taxes on real estate.
5. The duty which the internal revenue acts provided should be assessed, collected, and paid upon gains, profits, and incomes, was an excise or duty, and not a direct tax, within the meaning of the Constitution.

ERROR to the Circuit Court of the United States for the Southern District of Illinois.

In June, 1866, the deputy assessor of internal revenue for the proper district in Illinois delivered to William M. Springer a notice in writing, with certain accompanying forms, requiring him within ten days to make out and return, according to those forms, a list of his income, gains, and profits for the year 1865. In compliance therewith, Springer made out the necessary statement, dated June 21, 1866, and delivered it to the deputy, together with a written protest against the authority of the latter to demand the statement, on the ground that the acts of Congress under which that officer acted were unconstitutional and void. The statement, showing that the net income received by Springer for the year 1865, and subject to taxation, amounted to $50,798, upon which the sum of $4,799.80 was assessed as tax, was transmitted to David T. Littler, the collector, who, Nov. 17, 1866, payment being refused, served a notice upon Springer demanding payment, and warning him that, unless it should be made within ten days, the law authorized the collection of the tax, together with a penalty of ten per cent additional by distraint and sale.

Payment being again refused, and Springer having no goods or chattels which were known to the collector or his deputy, the collector, Jan. 24, 1867, caused a warrant for $5,279.78, the amount of the tax and penalty, to be issued and levied upon certain real estate in the city of Springfield, Sangamon County, Illinois, consisting of two pieces of lots in the same enclosure without any division fence, and belonging to Springer, upon one of which pieces was located his dwelling-house and upon the other his barn. The property was advertised, and, on March 15, 1867, sold, the United States becoming the purchaser for the amount of the tax, penalty, and costs. On that day Littler, as collector, made and executed to the United States a deed of the property, which, Nov. 28, 1868, was recorded in the recorder's office of that county. Jonathan Merriam, his successor as collector, made and executed, April 17, 1874, another deed to the United States for the same property. This deed was duly recorded April 23, 1874. It recites the assessment of the tax, the demand therefor, the seizure and sale of

the property "by virtue of an act of Congress of the United States of America, entitled 'An Act to provide internal revenue to support the government, and to pay interest on the public debt,' approved July 1, 1862, and the act of March 30, 1864, as amended."

Dec. 2, 1874, the United States brought this action of ejectment against Springer.

At the trial the plaintiff, having proved the foregoing facts, offered in evidence the deed of April 17, 1874; but the defendant objected thereto, on the ground that the deed is void, because the tax demanded of him was a direct tax, and, not being levied in the manner prescribed by the Constitution, was not a legal or valid demand upon him; that the summary levy upon and sale of his property without opportunity to him to be heard in court deprived him of his property without due process of law; that the acts of Congress purporting to authorize the assessment and levy of the tax, the sale of his property and the execution of the deed, were without force or validity; and that as the property was susceptible of division into separate tracts or lots, the laws of Illinois were disregarded by not selling it accordingly. He also for the same reasons objected to the introduction in evidence of the papers pertaining to the assessment, levy, and sale; but the court overruled the objection, and permitted them and the deed to be read in evidence. The defendant thereupon excepted.

It was proved by the defendant that he purchased the lots from different parties, that they are separately described, are susceptible of division, and would have sold to better advantage had they been sold separately; that they were assessed separately for the purpose of State taxation, and were, in 1866, worth between $10,000 and $12,000.

The court thereupon, at the request of the plaintiff, charged the jury: 1. That the deed in question is a valid instrument, and transferred to the United States the title of the defendant in and to the lots. 2. That the laws or acts of Congress mentioned in said deed were valid enactments at the time, and authorized the proceedings taken in the premises. To which instructions the defendant excepted, and asked the court to charge the jury, —

1. That the tax on the income, gains, and profits of the defendant, assessed upon him, as appears by the evidence in this case, was a direct tax within the meaning of the Constitution of the United States, and that, in order to constitute such tax a valid claim upon the defendant, it should have been apportioned among the several States the same as representatives in Congress are. And if the jury believe from the evidence that such tax was not so apportioned among the several States, then such tax was levied in violation of the Constitution, and the sale of defendant's property to satisfy the same is void, and in that case they will find for the defendant.

2. That the sale of defendant's real estate to satisfy the tax assessed upon him in a summary manner, without first having obtained a judgment in a court of record, was a proceeding to deprive the defendant of his property without due process of law; and if the jury believe from the evidence that defendant's real estate was sold to satisfy the tax assessed upon him, without having first obtained a judgment in a court of record, or without giving said defendant an opportunity to be heard in court, then such sale was void, and they will find for the defendant.

3. That if the jury believe from the evidence in this case that a penalty of ten per cent upon the amount of said tax was assessed upon defendant by the collector of internal revenue, which penalty amounted to $479.98, without having obtained a judgment in a court of record, by due process of law, and that the defendant's real estate was sold to satisfy said penalty, together with said tax, then such sale was void, and they will find for the defendant.

4. That a party claiming title to land under a summary or extraordinary proceeding must show that all the indispensable preliminaries to a valid sale which the law and the Constitution prescribe have been complied with; and if they believe from the evidence that the plaintiff has failed to show that all the requirements of the law have been complied with in the assessment and levy of the tax, the service of the notice, the issue of the warrant, and the execution thereof, in the advertisement and sale of the property, in the making and

execution of the deed, and in all the other requirements of the law, then they will find for the defendant.

5. That the sale of real estate to satisfy a personal tax not levied upon or a lien upon said real estate, without first having obtained a judgment in a court of record and an execution in pursuance thereof, is a proceeding to deprive a person of his property without due process of law; and if they believe from the evidence in this case that the tax levied upon defendant was not assessed in the first instance upon said real estate and made a lien thereon, and that said real estate was sold to satisfy said tax without a judgment of a court of record, then such sale is void, and they will find for the defendant.

But the court refused to so charge the jury, to which refusal the defendant excepted.

The jury found for the United States, and a motion for a new trial having been refused, to which refusal the defendant excepted, judgment was rendered accordingly. The defendant then sued out this writ, and here assigns for error, —

1. The admission in evidence of the deed and other papers in the court below.

2. The refusal of the court to charge the jury as requested by him.

3. The giving of the charge requested by the plaintiff.

4. The refusal to grant a new trial.

Mr. William M. Springer for the plaintiff in error.

The tax assessed against the plaintiff in error having been levied upon his income, gains, and profits, is a direct tax. 3 Smith's Wealth of Nations, 212, 213, 216, 220–228, 244–248, 271–274, 276–278; 2 Mill's Pol. Econ. 418–434; Say's Pol. Econ. 465–468, 480; Perry's Elements Pol. Econ. 443; 1 Chambers's Inf. for the People, 371; Brande's Dict. of Science, Literature, and Art, 1211; Wayland's Pol. Econ. 391, 392; Knight's Cyclopædia (London, 1842), title "Taxation;" Encyclopædia Britannica, title "Taxation;" Encyclopædia Americana, title "Taxes;" 4 Elliott's Debates, 433; Sir Morton Peto on Taxation, 50, 53; Goodrich's Science of Government, 251; Ricardo's Principles of Pol. Econ. 214, 221; 1 Pampletier, 557 (1816).

The tax on incomes not having been based, even professedly, upon population nor apportioned relatively among the several States, was in violation of the Constitution of the United States. Const. U. S., art. 1, sects. 2, 8, 9; 1 Kent, Com. 277; 2 Story, Const. 113, 143; *Loughborough* v. *Blake*, 5 Wheat. 317.

The acts of Congress by virtue of which the tax complained of was levied conferred no authority, for either its assessment and levy, the sale of his property, or the execution of a deed therefor.

The deed recites the act approved July 1, 1862, and that of *March* 30, 1864, as *amended*. No act of Congress bears the latter date. Consequently the deed was not admissible in evidence. But if it be contended by the United States that the act of *June* 30, 1864 (13 Stat. 218), was the one referred to, it is then submitted that that act, as amended by that of March 3, 1865, did not authorize the proceedings taken by the collector. The power to levy the tax is a limited one, and if the limits prescribed by law are transcended, the levy is void. *West School District of Canton* v. *Merrills*, 12 Conn. 437.

In every case where an individual tax is, upon trial, shown to be greater than the amount authorized, a sale of the land for the payment of such tax will be deemed void. *Kemper* v. *McClelland*, 19 Ohio, 324; *Elwell* v. *Shaw*, 1 Greene (Iowa), 335; Blackwell, Tax Titles, 160, 161.

The levy upon and sale of the property of the plaintiff in error was in violation of the provision of the Constitution of the United States declaring that "no person shall be deprived of his life, liberty, or property without due process of law." 3 Story, Const. 661; 1 id. 623–625; *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272; *Wynehamer* v. *The People*, 13 N. Y. 378; *People* v. *Berberrich*, 11 How. (N. Y.) Pr. 289.

"Due process of law," in its true and largest signification, means law in its regular course of administration by the courts of justice, and not the execution of a power vested in ministerial officers. *Hake* v. *Henderson*, 4 Dev. (N. C.) L. 15; *Taylor* v. *Porter*, 4 Hill (N. Y.), 146; *Bank of Columbia* v.

Okely, 4 Wheat. 235; *White* v. *White*, 5 Barb. (N. Y.) 481; *Reed* v. *Wright*, 2 Greene (Iowa), 22; *Hoocock* v. *Bennett*, 2 Cow. (N. Y.) 740; *Kenny* v. *Beverly*, 3 Hen. & M. (Va.) 336; *Brown* v. *Hummel*, 6 Pa. St. 87; *Ervine's Appeal*, 16 id. 256; *Arrowsmith* v. *Burlingame*, 4 McLean, 498; 5 Webster's Works, 487, 488; Cooley, Taxation, 316–319.

The request to the court below to charge the jury that a party claiming title to land under a summary or extraordinary proceeding must show that all the indispensable preliminaries to a valid sale have been complied with, should have been granted. *Games* v. *Stiles*, 14 Pet. 322; *Thatcher* v. *Powell*, 6 Wheat. 119; Cooley, Taxation, 308, 328, 334, 353, 354; *Rex* v. *Cooke*, 1 Cowp. 26; Blackwell, Tax Titles, 214–216; *Leland* v. *Bennett*, 5 Hill (N. Y.), 286; *Denike* v. *Rourke*, 3 Biss. 39; *Hardin* v. *Owings*, 1 Bibb (Ky.), 214.

Mr. Assistant Attorney-General Smith, contra.

MR. JUSTICE SWAYNE, after stating the facts, delivered the opinion of the court.

The central and controlling question in this case is whether the tax which was levied on the income, gains, and profits of the plaintiff in error, as set forth in the record, and by pretended virtue of the acts of Congress and parts of acts therein mentioned, is a direct tax. It is fundamental with respect to the rights of the parties and the result of the case. It will be last considered. Many of the other points made by the plaintiff in error reproduce the same thing in different forms of language. They will all be responded to without formally restating any of them. This will conduce to brevity without sacrificing clearness, and will not involve the necessary omission of anything proper to be said.

The plaintiff in error advises us by his elaborate brief "that on the trial of the case below the proceedings were merely formal," and that "no arguments or briefs were submitted, and only such proceedings were had as were necessary to prepare the case for the Supreme Court."

This accounts for the numerous defects in the record as a whole. It was doubtless intended that only the question presented in the first of the assignments of error should be consid-

ered here. In that respect the record is full and sufficient. Other alleged errors, however, have been pressed upon our attention, and we must dispose of them.

There is clearly a misrecital in the deed of one of the acts of Congress to which it refers. By the act of the *30th of March*, 1864, was clearly meant the act of the *30th of June*, in the same year. There is no act relating to internal revenue of the former date.

But the plaintiff in error cannot avail himself of this fact, for several reasons.

The point was not brought to the attention of the court below, and cannot, therefore, be insisted upon here. It comes within the rule *falsa demonstratio non nocet*. It was the act of June 30, 1864, as amended by the act of March 3, 1865, that was in force when the tax was assessed. The latter act took effect April 1, 1865, and declared that "the duty herein provided for shall be assessed, collected, and paid upon the gains, profits, and income for the year ending the thirty-first day of December next preceding the time for levying, collecting, and paying said duty."

The tax was assessed for the year 1865 in the spring of 1866, under the act of 1865, according to the requirements of that act; and we find, upon examination, that the assessment was in all things correct. 13 Stat. 469, 479. The criticism of the plaintiff in error in this regard is, therefore, without foundation.

The proceedings of the collector were not in conflict with the amendment to the Constitution which declares that "no person shall be deprived of life, liberty, or property without due process of law." The power to distrain personal property for the payment of taxes is almost as old as the common law. Cooley, Taxation, 302. The Constitution gives to Congress the power "to lay and collect taxes, duties, imposts, and excises." Except as to exports, no limit to the exercise of the power is prescribed. In *McCulloch* v. *Maryland* (4 Wheat. 316), Mr. Chief Justice Marshall said, "The power to tax involves the power to destroy." Why is it not competent for Congress to apply to realty as well as personalty the power to distrain and sell when necessary to enforce the payment of a tax? It is only the

further legitimate exercise of the same power for the same purpose. In *Murray's Lessee* v. *Hoboken Land and Improvement Co.* (18 How. 274), this court held that an act of Congress authorizing a warrant to issue, without oath, against a public debtor, for the seizure of his property, was valid; that the warrant was conclusive evidence of the facts recited in it, and that the proceeding was "due process of law" in that case. See also *De Treville* v. *Smalls*, 98 U. S. 517; *Sherry* v. *McKinley*, 99 id. 496; *Miller* v. *United States*, 11 Wall. 268; *Tyler* v. *Defrees*, id. 331.

The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every tax-payer is entitled to the delays of litigation is unreason. If the laws here in question involved any wrong or unnecessary harshness, it was for Congress, or the people who make congresses, to see that the evil was corrected. The remedy does not lie with the judicial branch of the government.

The statute of Illinois had no application to the point whether the premises should be sold by the collector *en masse* or in two or more parcels. The fact that the house was on one lot and the barn on the other, that the whole was surrounded by a common enclosure, and that the entire property was occupied as a single homestead, rendered it not improper for the collector to make the sale as it was made. No suspicion of bad faith attaches to him. He was clothed with a discretion, and it is to be presumed that he exercised it both fairly and well. *Olcott* v. *Bynum*, 17 Wall. 44.

Certainly the contrary does not appear. If the tax was not a direct tax, the instructions given by the court, brief as they were, covered the whole case, and submitted it properly to the jury.

The plaintiff in error was entitled to nothing more. The fourth instruction which he asked for was liable to several fatal objections. It was too general and indefinite. It left it for the jury to decide what were the "indispensable preliminaries" required by the law and Constitution in the numerous particulars specified. It referred to matters to which the attention of the court below does not appear to have been called, and in

regard to which, if this had been done, the requisite proof would doubtless have been supplied. It falls within the principle of the rule so often applied by this court, that where instructions are asked in a mass, if one of them be wrong the whole may be rejected. The record does not purport to give all the testimony, and its defects are doubtless largely due to the mode in which the case was tried, and the single object already stated which the parties then had in view. The instruction was properly refused.

To grant or refuse a new trial was a matter within the discretion of the court. That it was refused cannot be assigned for error here.

Several other minor points have been earnestly argued by the learned plaintiff in error, but as they are all within the category of not having been taken in the court below, we need not more particularly advert to them.

This brings us to the examination of the main question in the case.

The clauses of the Constitution bearing on the subject are as follows: —

"Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. . . . No capitation or other direct tax shall be laid unless in proportion to the census hereinbefore directed to be taken."

Was the tax here in question a *direct* tax? If it was, not having been laid according to the requirements of the Constitution, it must be admitted that the laws imposing it, and the proceedings taken under them by the assessor and collector for its imposition and collection, were all void.

Many of the provisions of the Articles of Confederation of 1777 were embodied in the existing organic law. They provided for a common treasury and the mode of supplying it with funds. The latter was by requisitions upon the several States. The delays and difficulties in procuring the compliance of the States, it is known, was one of the causes that led to the adop-

tion of the present Constitution. This clause of the articles throws no light on the question we are called upon to consider. Nor does the journal of the proceedings of the constitutional convention of 1787 contain anything of much value relating to the subject.

It appears that on the 11th of July, in that year, there was a debate of some warmth involving the topic of slavery. On the day following, Gouverneur Morris, of New York, submitted a proposition "that taxation shall be in proportion to representation." It is further recorded in this day's proceedings, that Mr. Morris having so varied his motion by inserting the word "direct," it passed *nem. con.*, as follows: "Provided always that direct taxes ought to be proportioned to representation." 2 Madison Papers, by Gilpin, pp. 1079–1081.

On the 24th of the same month, Mr. Morris said that "he hoped the committee would strike out the whole clause. . . . He had only meant it as a bridge to assist us over a gulf; having passed the gulf, the bridge may be removed. He thought the principle laid down with so much strictness liable to strong objections." Id. 1197. The gulf was the share of representation claimed by the Southern States on account of their slave population. But the bridge remained. The builder could not remove it, much as he desired to do so. All parties seem thereafter to have avoided the subject. With one or two immaterial exceptions, not necessary to be noted, it does not appear that it was again adverted to in any way. It was silently incorporated into the draft of the Constitution as that instrument was finally adopted.

It does not appear that an attempt was made by any one to define the exact meaning of the language employed.

In the twenty-first number of the Federalist, Alexander Hamilton, speaking of taxes generally, said: "Those of the *direct* kind, which principally relate to land and buildings, may admit of a rule of *apportionment*. Either the value of the land, or the number of the people, may serve as a standard." The thirty-sixth number of that work, by the same author, is devoted to the subject of internal taxes. It is there said, "They may be subdivided into those of the *direct* and those of the

indirect kind." In this connection land-taxes and poll-taxes are discussed. The former are commended and the latter are condemned. Nothing is said of any other direct tax. In neither case is there a definition given or attempted of the phrase "*direct tax.*"

The very elaborate researches of the plaintiff in error have furnished us with nothing from the debates of the State conventions, by whom the Constitution was adopted, which gives us any aid. Hence we may safely assume that no such material exists in that direction, though it is known that Virginia proposed to Congress an amendment relating to the subject, and that Massachusetts, South Carolina, New York, and North Carolina expressed strong disapprobation of the power given to impose such burdens. 1 Tucker's Blackstone, pt. 1, app., 235.

Perhaps the two most authoritative persons in the convention touching the Constitution were Hamilton and Madison. The latter, in a letter of May 11, 1794, speaking of the tax which was adjudicated upon in *Hylton* v. *United States* (3 Dall. 171), said, "The tax on carriages succeeded in spite of the Constitution by a majority of twenty, the advocates of the principle being reinforced by the adversaries of luxury." 2 Mad. Writings (pub. by Congress), p. 14. In another letter, of the 7th of February, 1796, referring to the case of *Hylton* v. *United States*, then pending, he remarked: "There never was a question on which my mind was better satisfied, and yet I have very little expectation that it will be viewed in the same light by the court that it is by me." Id. 77. Whence the despondency thus expressed is unexplained.

Hamilton left behind him a series of legal briefs, and among them one entitled "Carriage tax." See vol. vii. p. 848, of his works. This paper was evidently prepared with a view to the Hylton case, in which he appeared as one of the counsel for the United States. In it he says: "What is the distinction between *direct* and *indirect* taxes? It is a matter of regret that terms so uncertain and vague in so important a point are to be found in the Constitution. We shall seek in vain for any antecedent settled legal meaning to the respective terms. There is none. We shall be as much at a loss to find any disposition

of either which can satisfactorily determine the point." There being many carriages in some of the States, and very few in others, he points out the preposterous consequences if such a tax be laid and collected on the principle of apportionment instead of the rule of uniformity. He insists that if the tax there in question was a direct tax, so would be a tax on ships, according to their tonnage. He suggests that the boundary line between direct and indirect taxes be settled by "a species of arbitration," and that direct taxes be held to be only "capitation or poll taxes, and taxes on lands and buildings, and general assessments, whether on the *whole property* of individuals or on their *whole* real or personal estate. All else must, of necessity, be considered as indirect taxes."

The tax here in question falls within neither of these categories. It is not a tax on the "whole . . . personal estate" of the individual, but only on his income, gains, and profits during a year, which may have been but a small part of his personal estate, and in most cases would have been so. This classification lends no support to the argument of the plaintiff in error.

The Constitution went into operation on the 4th of March, 1789.

It is important to look into the legislation of Congress touching the subject since that time. The following summary will suffice for our purpose. We shall refer to the several acts of Congress, to be examined according to their sequence in dates. In all of them the aggregate amount required to be collected was apportioned among the several States.

The act of July 14, 1798, c. 75, 1 Stat. 53. This act imposed a tax upon real estate and a capitation tax upon slaves.

The act of Aug. 2, 1813, c. 37, 3 id. 53. By this act the tax was imposed upon real estate and slaves, according to their respective values in money.

The act of Jan. 19, 1815, c. 21, id. 164. This act imposed the tax upon the same descriptions of property, and in like manner as the preceding act.

The act of Feb. 27, 1815, c. 60, id. 216, applied to the District of Columbia the provisions of the act of Jan. 19, 1815.

The act of March 5, 1816, c. 24, id. 255, repealed the two preceding acts, and re-enacted their provisions to enforce the collection of the smaller amount of tax thereby prescribed.

The act of Aug. 5, 1861, c. 45, 12 id. 294, required the tax to be levied wholly on real estate.

The act of June 7, 1862, c. 98, id. 422, and the act of Feb. 6, 1863, c. 21, id. 640, both relate only to the collection, in insurrectionary districts, of the direct tax imposed by the act of Aug. 5, 1861, and need not, therefore, be more particularly noticed.

It will thus be seen that whenever the government has imposed a tax which it recognized as a *direct tax*, it has never been applied to any objects but real estate and slaves. The latter application may be accounted for upon two grounds: 1. In some of the States slaves were regarded as real estate (1 Hurd, Slavery, 239; *Veazie Bank* v. *Fenno*, 8 Wall. 533); and, 2, such an extension of the tax lessened the burden upon the real estate where slavery existed, while the result to the national treasury was the same, whether the slaves were omitted or included. The wishes of the South were, therefore, allowed to prevail. We are not aware that the question of the validity of such a tax was ever presented for adjudication. Slavery having passed away, it cannot hereafter arise. It does not appear that any tax like the one here in question was ever regarded or treated by Congress as a direct tax. This uniform practical construction of the Constitution touching so important a point, through so long a period, by the legislative and executive departments of the government, though not conclusive, is a consideration of great weight.

There are four adjudications by this court to be considered. They have an important, if not a conclusive, application to the case in hand. In *Hylton* v. *United States* (*supra*), a tax had been laid upon pleasure-carriages. The plaintiff in error insisted that the tax was void, because it was a direct tax, and had not been apportioned among the States as required by the Constitution, where such taxes are imposed. The case was argued on both sides by counsel of eminence and ability. It was heard and determined by four judges, — Wilson, Paterson, Chase, and Iredell. The three first named had been dis-

tinguished members of the constitutional convention. Wilson was on the committee that reported the completed draft of the instrument, and warmly advocated its adoption in the State convention of Pennsylvania. The fourth was a member of the convention of North Carolina that adopted the Constitution. The case was decided in 1795. The judges were unanimous. The tax was held not to be a *direct* tax. Each judge delivered a separate opinion. Their judgment was put on the ground indicated by Mr. Justice Chase, in the following extract from his opinion: —

"It appears to me that a tax on carriages cannot be laid by the rule of *apportionment* without very great inequality and injustice For example, suppose two States equal in census to pay eighty thousand dollars each by a tax on carriages of eight dollars on every carriage; and in one State there are one hundred carriages, and in the other one thousand. The owners of carriages in one State would pay ten times the tax of owners in the other. A., in one State, would pay for his carriage eight dollars; but B., in the other State, would pay for his carriage eighty dollars."

It was well held that where such evils would attend the apportionment of a tax, the Constitution could not have intended that an apportionment should be made. This view applies with even greater force to the tax in question in this case. Where the population is large and the incomes are few and small, it would be intolerably oppressive.

The difference in the ability of communities, without reference to numbers, to pay any taxes is forcibly remarked upon by McCulloh in his article on taxation in the Encyclopædia Britannica, vol. xxi. (old ed.) p. 75.

Mr. Justice Chase said further, "That he would give no judicial opinion upon the subject, but that he was inclined to think that the *direct taxes* contemplated by the Constitution were only two, — a capitation tax and a tax on land."

Mr. Justice Iredell said: "Perhaps a direct tax, in the sense of the Constitution, can mean nothing but a tax on something inseparably annexed to the soil. . . . A land or poll tax may be considered of this description. The latter is to be so considered, particularly under the present Constitu-

tion, on account of the slaves in the Southern States, who give a ratio in the representation in the proportion of three to five."

Mr. Justice Paterson said, he never entertained a doubt "that the principal, he would not say the *only*, objects contemplated by the Constitution as falling within the rule of apportionment, were a capitation tax and a tax on land." From these views the other judges expressed no dissent.

"Ellsworth, the Chief Justice sworn into office that morning, not having heard the whole argument, declined taking part in the decision." 8 Wall. 545. Cushing, from ill-health, did not sit in the case. It has been remarked that if they had been dissatisfied with the result, the question involved being so important, doubtless a reargument would have been had.

In *Pacific Insurance Co.* v. *Soule* (7 Wall. 433), the taxes in question were upon the receipts of such companies from premiums and assessments, and upon all sums made or added, during the year, to their surplus or contingent funds. This court held unanimously that the taxes were not *direct taxes*, and that they were valid.

In *Veazie Bank* v. *Fenno* (*supra*), the tax which came under consideration was one of ten per cent upon the notes of State banks paid out by other banks, State or National. The same conclusions were reached by the court as in the preceding case. Mr. Chief Justice Chase delivered the opinion of the court. In the course of his elaborate examination of the subject he said, "It may be rightly affirmed that, in the practical construction of the Constitution by Congress, direct taxes have been limited to taxes on land and appurtenances and taxes on polls, or capitation taxes."

In *Scholey* v. *Rew* (23 Wall. 331), the tax involved was a succession tax, imposed by the acts of Congress of June 30, 1864, and July 13, 1866. It was held that the tax was not a *direct* tax, and that it was constitutional and valid. In delivering the opinion of the court, Mr. Justice Clifford, after remarking that the tax there in question was not a direct tax, said: "Instead of that, it is plainly an excise tax or duty, authorized by sect. 1, art. 8, of the Constitution, which vests the power in

Congress to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defence and public welfare."

He said further: "Taxes on houses, lands, and other permanent real estate have always been deemed to be direct taxes, and capitation taxes, by the express words of the Constitution, are within the same category; but it has never been decided that any other legal exactions for the support of the Federal government fall within the condition that unless laid in proportion to numbers the assessment is invalid."

All these cases are undistinguishable in principle from the case now before us, and they are decisive against the plaintiff in error.

The question, what is a direct tax, is one exclusively in American jurisprudence. The text-writers of the country are in entire accord upon the subject.

Mr. Justice Story says all taxes are usually divided into two classes, — those which are *direct* and those which are *indirect*, — and that "under the former denomination are included taxes on land or real property, and, under the latter, taxes on consumption." 1 Const., sect. 950.

Chancellor Kent, speaking of the case of *Hylton* v. *United States*, says: "The better opinion seemed to be that the direct taxes contemplated by the Constitution were only two; viz., a capitation or poll tax and a tax on land." 1 Com. 257. See also Cooley, Taxation, p. 5, note 2; Pomeroy, Const. Law, 157; Sharswood's Blackstone, 308, note; Rawle, Const. 30; Sergeant, Const. 305.

We are not aware that any writer, since *Hylton* v. *United States* was decided, has expressed a view of the subject different from that of these authors.

Our conclusions are, that *direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty. Pomeroy, Const. Law, 477; *Pacific Insurance Co.* v. *Soule*, and *Scholey* v. *Rew*, *supra*.

Against the considerations, in one scale, in favor of these

propositions, what has been placed in the other, as a counterpoise? Our answer is, certainly nothing of such weight, in our judgment, as to require any special reply.

The numerous citations from the writings of foreign political economists, made by the plaintiff in error, are sufficiently answered by Hamilton in his brief, before referred to.

Judgment affirmed.

UNITED STATES v. CHOUTEAU.

1. In an action by the United States upon a bond executed by A., a distiller, and his sureties, the breaches of the condition assigned in the declaration or complaint were, first, that by omitting to make certain entries in a book which he, by sect. 3303, Rev. Stat., was required to keep, he was enabled to defraud, and did defraud, the United States of the tax imposed by law upon the spirits produced at his distillery; and, second, that in violation of sect. 3296 he had removed spirits produced at his distillery to a place other than the distillery warehouse, without the tax thereon having been first paid. To the first assignment the defendants answered by denying its allegations, and averring that whatever fraud was committed was effected through other means than those charged. To the second they answered, that before the suit was brought two bills of indictment, for the same removals of spirits now complained of, were found against A., one containing counts upon said section and upon sections 3281 and 5440, and that upon the recommendation of the Attorney-General and the advice of the Secretary of the Treasury, the Commissioner of Internal Revenue accepted from him a specified sum, in a compromise, satisfaction, and settlement of the indictments, which were thereupon dismissed and abandoned by the United States. Upon a demurrer to the answer, — *Held*, that the answer was a bar to the action.
2. *Quære*, whether the only mode for the recovery of the penalty prescribed by sect. 3296 is not by indictment.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

This is an action upon a bond of a distiller, against the principal and sureties, and is founded upon sects. 3303 and 3296 of the Revised Statutes. The bond is in the penal sum of $25,000, and, after reciting that the principal, Joseph G. Chouteau, intends, after the first day of May, 1874, to be

engaged in the business of a distiller within the first collection district of Missouri, to wit, at Grand Avenue and Main Street, in the city of St. Louis, in that State, it is conditioned, among other things, that he "shall in all respects faithfully comply with all the provisions of law in relation to the duties and business of distillers, and shall pay all penalties incurred or fines imposed on him for a violation of any of the said provisions."

Sect. 3303 is as follows: —

"Every person who makes or distils spirits, or owns any still, boiler, or other vessel used for the purpose of distilling spirits, or who has such still, boiler, or other vessel so used under his superintendence, either as agent or owner, or who uses any such still, boiler, or other vessel, shall from day to day make, or cause to be made, in a book or books, to be kept by him in such form as the Commissioner of Internal Revenue may prescribe, a true and exact entry of the kind of materials, and the quantity in pounds, bushels, or gallons, purchased by him for the production of spirits, from whom and when purchased, and by what conveyance delivered at said distillery, the amount paid therefor, the kind and quantity of fuel purchased for use in the distillery, and from whom purchased, the amount paid for ice or water for use in the distillery, the repairs placed on said distillery or distilling-apparatus, the cost thereof, and by whom and when made, and of the name and residence of each person employed in or about the distillery, and in what capacity employed. And in another book he shall make like entry of the quantity of grain or other material used for the production of spirits, the time of day when any yeast or other composition is put into any mash or beer for the purpose of exciting fermentation, the quantity of mash in each tub, designating the same by the number of the tub, the number of dry inches, that is to say, the number of inches between the top of each tub and the surface of the mash or beer therein at the time of yeasting, the gravity and temperature of the beer at the time of yeasting, and on every day thereafter its quantity, gravity, and temperature at the hour of twelve meridian; also, of the time when any fermenting-tub is emptied of ripe mash or beer, the number of gallons of spirits distilled, the number of gallons placed in the warehouse, and the proof thereof, the number of gallons sold or removed, with the proof thereof, and the name, place of business, and residence of the person to whom sold."

Sect. 3296 is as follows: —

"Whenever any person removes, or aids or abets in the removal of, any distilled spirits on which the tax has not been paid, to a place other than the distillery warehouse provided by law, or conceals, or aids in the concealment of, any spirits so removed, or removes, or aids or abets in the removal of, any distilled spirits from any distillery warehouse, or other warehouse for distilled spirits, authorized by law, in any manner other than is provided by law, or conceals, or aids in the concealment of, any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than two hundred dollars, nor more than five thousand dollars, and imprisoned not less than three months, nor more than three years."

The complaint in the action, or petition as it is termed, contains eighty-four assignments of breaches of the conditions of the bond, forty-two of which, constituting the odd numbers, are founded upon sect. 3303, and forty-two, constituting the even numbers, are founded upon sect. 3296. The difference in the breaches assigned in each class is in respect to the day on which the act constituting the breach is alleged to have been done, commencing on the second day of May, and ending on the fifteenth day of August, 1874. The same breach of duty is charged to have been committed on forty-two different days.

The breach stated in each of the assignments designated by odd numbers is, that the distiller omitted to make, in a book he was required by law to keep, a true and exact entry of the kind and quantity of materials used by him in the production of distilled spirits; that he produced from the grain used a large quantity of spirits, and "that by means of the said omission to make said entry in said book as aforesaid" he "was enabled to defraud and did defraud the plaintiff out of the internal revenue tax then and there imposed by law on spirits, whereby the plaintiff is damaged in the sum of $2,100."

To this breach in the various assignments the defendants answer, and deny that by reason of the alleged omission of the distiller to make proper entries in the distiller's book men-

tioned he was enabled to defraud and did defraud the United States of the tax on distilled spirits produced at his distillery, or any part of the tax; and state that, prior to any of the acts complained of, the distiller combined, confederated, and conspired with certain designated revenue officers and agents, and other distillers and rectifiers, to defraud the United States of the tax on distilled spirits produced at various distilleries within the first collection district of Missouri; that, in furtherance of this conspiracy and to accomplish its purpose, the parties concerned in it committed various violations of the revenue laws, and among other things they removed and aided in the removal of distilled spirits from the distilleries without having first paid the tax on them; they reused upon packages paid and warehouse stamps which had been previously used; they gave and received bribes, and made and connived at making false and fraudulent reports to the collector of internal revenue within the district of the quantities of spirits produced upon which taxes had become due; that the distiller, by reason of his participation in this conspiracy, was enabled, if at all, to defraud the United States of the tax on distilled spirits produced at his distillery within the period covered by his bond; that the internal revenue officers charged with the execution and enforcement of the internal revenue laws had no occasion to have recourse to the distiller's book and the store-keeper's record kept at the distillery, and did not have recourse to them, or examine them to obtain information touching the quantities of grain used and the number of gallons produced at the distillery; and that it was by reason of the organization and execution of this conspiracy, irrespective of the omission to make the entries mentioned, that the conspirators were enabled to defraud the United States of the tax on spirits produced at the distillery.

The breach stated in each of the assignments designated by even numbers is, that the distiller removed spirits produced at his distillery to a place other than the distillery warehouse, without the internal revenue tax imposed thereon being first paid, thereby incurring a penalty of $2,800, which sum he has not paid.

To this breach in the various assignments the defendants

answer that the United States ought not to maintain its action for the penalty denounced in sect. 3296, for, at the November Term, 1875, in the District Court of the United States for the Eastern District of Missouri, two bills of indictment were found against said Chouteau, the distiller, one of which contained counts founded upon that section, alleging the removal by him, and his aiding and conniving at the removal, of distilled spirits from his distillery to a place unknown, upon which spirits the revenue tax was imposed and had not been paid, the other counts being founded upon sects. 3281 and 5440 of the Revised Statutes; that afterwards, with the advice and consent of the Secretary of the Treasury and upon the recommendation of the Attorney-General, the Commissioner of Internal Revenue accepted from the distiller $1,000 in full satisfaction, compromise, and settlement of the indictment and prosecutions, which were thereupon dismissed and abandoned.

And the defendants further answering, state "that the alleged removals of distilled spirits set forth in the various assignments of breaches now answered are the same removals recited in the said indictment; that all of the said removals of spirits complained of in plaintiff's petition might have been established, if said allegations be true, under the said indictments, either upon those counts based upon sect. 3296, or that count based upon sect. 3281; that all of the evidence which would be necessary to establish, and competent under the various assignments of breaches in plaintiff's petition, would also be competent under and would tend to establish the allegations of said indictments; that the various assignments of breaches in plaintiff's petition relate to the same subject-matter and are based upon the same transaction as the various allegations in said indictments contained, so far as they relate to alleged offences under sects. 3296 and 3281 and 5440, and that at the time when the said indictments were presented to said grand jury, and at the time when the said indictments were considered by said grand jury, all of the facts which would be competent to sustain the allegations of plaintiff's petition were known to, and within the possession of, the representative of the United States."

The United States demurred to the answer. The demurrer was overruled, and judgment entered thereon in favor of the defendants. The case was then removed here by writ of error.

The Solicitor-General for the plaintiff in error.

No counsel appeared for the defendants in error.

MR. JUSTICE FIELD, after stating the facts, delivered the opinion of the court.

As seen by the statement of the case, each breach of the condition of the bond in suit, of the class designated by odd numbers, consists in the omission of the distiller to make the required entries in the book provided in sect. 3303. The petition alleges that, by "means of the said omission," the distiller was enabled to defraud and did defraud the United States of the tax imposed by law upon the spirits produced at his distillery. The answer denies this allegation, and avers that whatever fraud was committed upon the United States was effected through other means. The demurrer admits that averment to be true, and the question is thus presented whether a party seeking damages for a specified breach of duty is entitled to judgment in his favor, when admitting on the record that whatever damages he may have sustained resulted from other causes.

The case is not brought for any tax alleged to be due to the United States, which they would be entitled to recover, whatever the cause of its non-payment. In such a case it would be of no consequence whether the cause assigned for the default of the party was the true one or not; the obligation to the government would be the same. Here a specific omission of duty on the part of the distiller is alleged, for which it is sought to charge both him and his sureties on their bond. Their liability is only to the extent of the damages sustained. If none resulted to the United States from the omission stated, none can be recovered either against him or his sureties. The law does not affix any specific penalty for the omission. If, therefore, the allegations of the petition were simply traversed, the government would be compelled to prove, not only the omission complained of, but that by means of

it the tax on the spirits produced was lost, which constitutes the damages alleged. It would not be sufficient to show that by other omissions of duty the government was thus defrauded, for that would be to change the entire ground of the action, the specific gravamen of the complaint.

Now, the demurrer admits that the ground of complaint — the specific breach of duty stated — did not cause the damages charged, but that whatever damages were sustained by the United States were effected by other means. Therefore the action, so far as damages are claimed for the particular omission of duty mentioned, must fail.

It is true that the breaches of duty, which are stated by the defendants in their answer as the means by which the United States were defrauded, are a series of stupendous frauds, for which the guilty parties deserve severe punishment; still they were none the less available as a defence to an action charging to other causes the damages which they produced. It is certainly one way of defending against the charge of a wrongful act for which damages are sought, to show that, notwithstanding the wrong committed, the damages resulted from other causes, however objectionable a pleading might be with averments to that effect instead of a distinct traverse of the allegations of the complaint. If, for example, a party should charge another with inflicting upon his person a wound by which he lost an arm, it would be a good defence to show that the loss resulted from unskilful medical treatment or neglect and not from the wound inflicted. So here, it is enough for the sureties to show that the loss to the government was produced by other means than the particular breach of duty by their principal, of which the government complains. It is of no consequence to them, so far as the present action is concerned, how many other sins of omission or commission he may have committed, if they can show that the particular damage claimed was not the result of the one charged.

As to the breaches of duty in the assignments of the class designated by even numbers, we are of opinion that the compromise with the government pleaded is a complete defence against a recovery of the penalty claimed. Each breach alleged consists in the removal by the distiller of spirits pro-

duced at his distillery to a place other than the distillery warehouse, without first paying the tax imposed thereon. The penalty prescribed for this offence was intended as part punishment for it, and may be enforced, equally as the additional fine and imprisonment, by criminal prosecution. It was not intended in any sense as a substitute for the tax required, or as any abatement of it when recovered. This is evident from the fact that it may be applied to those who have aided or abetted in the removal, whether the distiller or one having no interest in the spirits. So, too, the payment of the tax may be made after the removal, and yet the penalty not be discharged; it could still be imposed upon the offending party.

It may be questioned whether the only mode for a recovery of the penalty is not by indictment; but assuming that it may be recovered in a civil action, the compromise pleaded covers the penalties here claimed. Two indictments have been found against the distiller, one of which contains counts for the specific offences, which constitute the whole ground and cause of the present action. Under the authority of an act of Congress, a compromise with the government was effected, by which a specific sum was paid by him, and received by the government, "in full satisfaction, compromise, and settlement of said indictments and prosecutions," which were accordingly dismissed and abandoned. That compromise necessarily covered the causes or grounds of the prosecutions, and consequently released the party from liability for the offences charged and any further punishment for them. The answer avers that the removals of distilled spirits set forth in the assignment of breaches of the condition of the bond are the same removals recited in the indictments, and that all the evidence necessary to establish the breaches assigned would have been necessary and competent under the indictments. The two proceedings, the civil action and the criminal prosecution, so far as they relate to offences under sect. 3296, are based upon the same transactions.

The question, therefore, is presented whether sureties on a distiller's bond shall be subjected to the penalty attached to the commission of an offence, when the principal has effected

a full and complete compromise with the government, under the sanction of an act of Congress, of prosecutions based upon the same offence and designed to secure the same penalty.

Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term "penalty" involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. The compromise pleaded must operate for the protection of the distiller against subsequent proceedings as fully as a former conviction or acquittal. He has been punished in the amount paid upon the settlement for the offence with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offence. To hold otherwise would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the government delusive and useless.

Whilst there has been no conviction or judgment in the criminal proceedings against the distiller here, the compromise must on principle have the same effect. The government through its appropriate officers has indicated, under the authority of an act of Congress, the punishment with which it will be satisfied. The offending party has responded to the indication and satisfied the government. It would, therefore, be at variance with right and justice to exact in a new form of action the same penalty. For, as it was justly said by this court in *Ex parte Lange*, speaking through Mr. Justice Miller, "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And, though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party where a second punishment is proposed in the same court, on the

same facts, for the same statutory offence. The principle finds expression in more than one form in the maxims of the common law." 18 Wall. 168, 168.

Judgment affirmed.

NOTE. — In *United States* v. *Ulrici*, error to the Circuit Court of the United States for the Eastern District of Missouri, which was submitted at the same time, MR. JUSTICE FIELD delivered the opinion of the court.

This case involves substantially the same questions considered in *United States* v. *Chouteau*. Here the principal on the bond in suit pleaded guilty to the indictments found against him, and was fined $1,000 and imprisoned for one day. The punishment inflicted was for offences which are set forth in the petition in this action as breaches of the condition of the bond. This difference in the two cases does not affect the principle upon which the first was decided. Upon its authority the judgment is

Affirmed

CRAMER v. ARTHUR.

1. The valuation of foreign standard coins, which the act of March 3, 1873, c. 268 (17 Stat. 602; Rev. Stat., sect. 3564), requires the director of the mint to estimate annually, and the Secretary of the Treasury to proclaim on the first day of January, is as binding on collectors of customs and importers, as if declared by statute; and evidence is not receivable to show that it is inaccurate. *The Collector* v. *Richards* (23 Wall. 246) cited and reaffirmed.
2. Pursuant to sect. 2903 of the Revised Statutes, providing for the case of invoices made out in a depreciated currency issued and circulated under authority of any foreign government, regulations were established declaring that where the standard value of a foreign currency has been proclaimed by the Secretary of the Treasury, in the manner provided by law, such value shall control in estimating customs duties, unless collectors have been otherwise instructed, or unless a depreciation of the value of that currency, "expressed in an invoice from the standard of that currency, shall be shown by consular certificate thereto attached." *Held*, that the proclamation and certificate are conclusive.

ERROR to the Circuit Court of the United States for the Southern District of New York.

The facts are stated in the opinion of the court.

Mr. Lewis Sanders for the plaintiff in error.

Mr. Assistant Attorney-General Smith, contra.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is a suit against the collector of customs for the port of New York to recover back duties alleged to have been overcharged. In August and September, 1874, the plaintiff imported goods from Vienna, in Austria, chargeable with an *ad valorem* duty. The invoices upon which they were entered at the custom-house were made out in Austrian paper florins, in which currency they were purchased, and amounted to the sum of $10{,}163\frac{71}{100}$ florins. This was assessed and liquidated by the collector at the sum of $4,818, gold coin of the United States, by converting the same into Austrian silver florins at $45\frac{77}{100}$ cents for each paper florin, and $47\frac{6}{10}$ cents, gold coin of the United States, for each Austrian silver florin, making the duty equal to $1,930.67. The plaintiff paid the duty under a written protest, addressed to the collector, in which he assigned the following ground of objection, namely: "In computing the amount in United States money of foreign dutiable value of the merchandise covered by the said entries, you have estimated the value of the paper florin, being the currency in which invoices, upon which entries were made, were made out, to be greater than 40 cents. I claim that under existing laws and upon the fact that in computations at the custom-house the value of the paper florin therein specified should be estimated as of the value of 40 cents, and shall hold you responsible for the excess of duty thus illegally claimed and exacted." The plaintiff having appealed to the Secretary of the Treasury, without effect, brought the present action to recover the alleged excess of duty exacted.

On the trial, the foregoing facts being proved, the plaintiff took the stand, and testified that he was in Vienna in 1873 and part of 1874, and that in those years, and for some time prior thereto, the silver florin was not in circulation in Austria, having ceased to be a standard or measure of value early in 1873, owing to the fact that silver had been demonetized by the German Empire, where it had previously been current; its place, as a standard, being taken by the 8-florin Austria-Hungarian gold piece; that by the official paper or gazette of the stock exchange of Vienna the silver florin was worth $45\frac{46}{100}$ cents in American gold coin in September, 1874, and the paper

florin, $43\frac{71}{100}$ cents; that the actual value of the invoice in question was $4,442.56; that the amount of duty should have been assessed at $1,780.67; and that the excess paid and claimed is $150.

The plaintiff further exhibited in evidence a letter of the Secretary of the Treasury to the collector of customs at New York, dated Oct. 23, 1874 (a few weeks after the importation of the goods in question), in which he stated, amongst other things, that the department had authentic information that the silver florin had generally been thrown out of use, both as a standard and as currency, its place as a standard being taken by the 8-florin gold piece, which had its exact equivalent in the 20-franc gold piece of France; that under these circumstances it became necessary to review the former action of the department in determining the value of the florin of Austria for assessment of duty on imports, and to apply to the 8-florin gold piece and the paper florin the rules applied to all currencies the values of which are not declared in terms by some specific statute: the collector was, therefore, directed to accept the certificate of a consul of the United States at any point in Austria-Hungary as to the value of the paper florin relatively to the 8-florin gold piece and its equivalent in American gold dollars, as the true value for duty of any invoice of merchandise properly expressed in that currency.

The defendant gave in evidence the consular certificate of the United States consul at Vienna, attached to the invoice, in which it was stated that the true value of the currency of the Austria-Hungarian monarchy, in which the invoice was made out, was $45\frac{77}{100}$ cents estimated in United States gold, silver florin being $47\frac{60}{100}$ cents. He also gave in evidence an extract from the proclamation of the Secretary of the Treasury, made on the 1st of January, 1874, announcing the determinations of the value of foreign moneys made by the director of the mint under the act of March 3, 1873 (17 Stat. 602), which extract was as follows, to wit: —

"The following list of standard values of foreign currencies in the money of account of the United States shall be used in the computation of customs duties, until otherwise provided by law or regulation: —

"Foreign moneys of account and their values in United States money of account. Austria, monetary unit, florin; standard, silver; value in U. S. money of account, 47.60 [cents]."

Upon this evidence the court directed a verdict for the defendant, and the plaintiff excepted.

Since the transactions above mentioned took place, we have decided the case of *The Collector* v. *Richards* (23 Wall. 246), which arose about the same time, and in which some of the questions involved in the present case were determined. We there held that the act of March 3, 1873, which declared that the value of foreign coin, as expressed in the money of account of the United States, should be that of the pure metal of such coin of standard value; and that the values of the standard coins in circulation, of the various nations of the world, should be estimated annually by the director of the mint, and be proclaimed on the first day of January by the Secretary of the Treasury, superseded previous acts passed for fixing the value of foreign money, both in estimating the invoices of goods imported from foreign countries, and for other purposes. Prior to 1873, various acts had been passed fixing the value of foreign money in invoices, commencing with the collection act of 1789, by the eighteenth section of which the rates for estimating certain foreign coins and currencies were prescribed. 1 Stat. 41. By this act, amongst other things, the pound sterling was valued at $4.44. Various changes and additions were made in subsequent laws. Id. 167, 673; 2 id. 121; 5 id. 496, 625; 9 id. 14; 12 id. 207. In 1842, the value of the pound sterling, in computations for payments to the treasury and in appraising merchandise, was fixed at $4.84. The last general law relating to the values of other foreign moneys was that of May 22, 1846. 9 id. 14. By this act, amongst other things, the value of the florin of the southern States of Germany was fixed at 40 cents; the florin of the Austrian Empire and of the city of Augsburg, at 48½ cents; and the franc of France, Belgium, &c., at 18 cents 6 mills. This was apparently the act upon which the plaintiff in his protest based his claim that the florin in his invoice should be estimated at 40 cents. It was this act under which the importer in *The Collector* v. *Richards* claimed that the franc should be

estimated at 18 cents 6 mills. In that case we held that the act of 1846 was repealed by the act of 1873 (which expressly repealed all acts and parts of acts inconsistent therewith); and that, instead of a fixed and permanent valuation of foreign coins (which must often involve a departure from the true values), Congress had adopted the juster plan of having them subjected to annual revision by the director of the mint, and announced to the public by proclamation of the Secretary of the Treasury. And as the franc had been thus proclaimed to be worth 19 cents and 3 mills, we decided that the collector rightly adopted that valuation.

In the present case, the act of 1846, if it were in force, would not help the plaintiff, inasmuch as it fixes the value of the Austrian florin at 48½ cents, which is a higher rate than that announced in the Secretary's proclamation of 1874. He seems, however, to have based his claim on the valuation, in the law of 1846, of the florin of the southern States of Germany, which was at 40 cents. But, since we have decided that that act was repealed by the act of 1873, it is unnecessary to examine it further.

That the florin is the standard money of account of Austria is as evident as that the pound sterling is the standard money of account of Great Britain. The plaintiff's own invoice is a proof of this. Whether represented by a corresponding coin of equal amount is of no consequence. It was only since the beginning of the present century that the pound sterling was thus represented; and yet its value was as fixed and certain before the sovereign was coined as since. Coin is the basis of the currency of both countries. The plaintiff concedes that the eight-florin gold piece is a standard coin of Austria; and he does not pretend that, according to this standard, the florin would be less than it was valued at in the proclamation of the Secretary of the Treasury. The silver florin was also formerly a standard coin in Austria, and the florin as a money of account originally derived its value therefrom. It was from this coin that the valuation of the florin was made by the director of the mint, as set forth in the proclamation of the Secretary. That valuation, so long as it remained unchanged, was binding on the collector and on importers, — just as bind-

ing as if it had been in a permanent statute, like the statute of 1846, for example. Parties cannot be permitted to go behind the proclamation, any more than they would have been permitted to go behind the statute, for the purpose of proving by parol, or by financial quotations in gazettes, that its valuations are inaccurate. The government gets at the truth, as near as it can, and proclaims it. Importers and collectors must abide by the rule as proclaimed. It would be a constant source of confusion and uncertainty if every importer could, on every invoice, raise the question of the value of foreign moneys and coins.

But whilst the annual proclamation of the determinations made by the director of the mint has taken the place of a permanent statutory valuation of foreign coins, it has no greater force than a statute would have. The question still remains, whether the fact that the invoice was made out in a depreciated currency entitled the plaintiff to a reduction, and, if it did, whether such reduction was refused by the collector.

The laws have always made provision for the case of invoices made out in depreciated currencies. In the collection act of 1799, the sixty-first section, which fixed the values of different foreign moneys, concluded with the following proviso: "*Provided*, that it shall be lawful for the President of the United States to cause to be established fit and proper regulations for estimating the duties on goods, &c., imported into the United States, in respect to which the original cost shall be exhibited in a depreciated currency, issued and circulated under authority of any foreign government." This proviso has always continued in force, and now constitutes sect. 2903 of the Revised Statutes. Such a law is the more necessary, in view of another provision, enacted in 1801 (2 Stat. 121) and continued in sect. 2838 of the Revised Statutes, directing that "all merchandise subject to a duty *ad valorem* shall be made out in the currency of the place or country where the importation shall be made, and shall contain a true statement of the actual cost of such merchandise in such foreign currency or currencies, without any respect to the value of the coins of the United States, or of foreign coins by law made current within the United States

in such foreign place or country." It was the object of this law to compel the parties to show, in the invoices, the actual prices and cost of their goods, in the currency of the country where bought, and not leave it to them to make a pretended estimate of the cost in a coin valuation. It is true, the government is not bound by the invoice, but may have the value of the goods appraised. Rev. Stat., sects. 2904, 2907. Nevertheless, such invoices, exhibiting the actual transactions, and capable of being verified by oath, are essential instrumentalities in the prevention of fraud; and, in the absence of suspicious circumstances, usually furnish the basis for estimating the actual values of the goods. But since they are required to be expressed in the actual currency of the country of exportation, and since that currency may be depreciated, it is obvious that the authority given to the President by the act of 1799, to establish fit and proper regulations for estimating the duties when the goods are invoiced in such money, is very important. It was passed at a time when the nations of Europe were at war, and the United States was neutral. In England and France, and perhaps other countries, specie payments had been suspended, and currencies based on government credit had been adopted. The law seems to have had in view artificial money of this kind; a depreciated currency, not based on specie, but still "issued and circulated under authority of the government." But it has been liberally construed by the government; and the President, acting through the Secretary of the Treasury, has established regulations on the subject which are sufficiently broad to meet every proper case.

The regulation in force at the time of the importation in question was as follows, namely: —

"Where the standard value of a foreign currency has been proclaimed by the Secretary of the Treasury, in the manner provided by law, that value is to be taken in all cases in estimating customs duties, unless collectors have been otherwise instructed, or unless a depreciation of the value of the foreign currency, expressed in an invoice from the standard of that currency, shall be shown by consular certificate thereunto attached."

In the present case a consular certificate was, in fact, attached to the invoice in the following words, to wit: —

"I, P. S. Post, consul of the United States of America, do hereby certify that the true value of the currency of the Austria-Hungarian Monarchy, in which currency the annexed invoice of merchandise is made out, is $45\frac{77}{100}$ cents estimated in United States gold, silver florin being $47\frac{60}{100}$ cents.

(Signed) "P. S. POST." [SEAL.]

In this certificate the consul assumes the value of the silver florin to be as it was proclaimed to be at the beginning of the year by the Secretary of the Treasury, namely, $47\frac{60}{100}$ cents; and, on this basis, he certifies that the value of the florin in the currency in which the invoice was made out was $45\frac{77}{100}$ cents; and this, as we understand the statement of the case, is the valuation adopted by the collector in assessing the duties in question. The plaintiff seeks to go behind this valuation, and to show that, at the time of the purchase of the goods, the value of the silver florin in Vienna, as quoted in the papers, and as exhibited by the actual rate of exchange, was less than $47\frac{60}{100}$ cents, namely, $45\frac{46}{100}$ cents, and that the value of the paper florin was $43\frac{71}{100}$ cents.

This we think the plaintiff cannot be allowed to do. The proclamation of the Secretary and the certificate of the consul must be regarded as conclusive. In the estimation of the value of foreign moneys for the purpose of assessing duties, there must be an end to controversy somewhere. When Congress fixes the value by a general statute, parties must abide by that. When it fixes the value through the agency of official instrumentalities, devised for the purpose of making a nearer approximation to the actual state of things, they must abide by the values so ascertained. If the currency is a standard one, based on coin, the Secretary's proclamation fixes it; if it is a depreciated currency, the parties may have the benefit of a consular certificate. To go behind these and allow an examination by affidavits in every case would put the assessment of duties at sea. It would create utter confusion and uncertainty. If existing regulations are found to be insufficient, if they lead to inaccurate results, the only remedy is to apply to the President, through the Treasury Department, to change the regulations. From the letter of the Secretary exhibited in this case, we infer that this was afterwards done,

and that he made the desired change. But this change in the regulations does not affect prior transactions which took place before they went into effect. These transactions must be governed by the regulations in force at the time. It is of the utmost consequence to the government, and it is, on the whole, most beneficial to importers, that the value of foreign moneys should be officially ascertained, and that they should be fixed by a uniform method or rule.

Judgment affirmed.

AUFFM'ORDT v. RASIN.

1. A., with a view of giving preference to B., a creditor, transferred to him, Nov. 15, 1873, certain securities. B. accepted them with knowledge that A. was insolvent. Proceedings in bankruptcy were instituted against A. Feb. 7 1874, and he was declared to be a bankrupt. His assignee brought suit in June, 1875, against B. for the value of the securities. *Held*, that he was entitled to recover.
2. The tenth section of the act of June 22, 1874 (18 Stat., part 3, 178), whereby, in cases of involuntary or compulsory bankruptcy, the period of four months mentioned in sect. 35 of the Bankrupt Act of March 2, 1867 (14 id. 534), was changed to two months, did not take effect until two months after its passage. It was not intended to destroy previously vested rights of property or of action, nor was it in the nature of a statute of limitations. It merely declared that certain acts thereafter committed, more than two months prior to the institution of proceedings in bankruptcy, should be valid.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The facts are stated in the opinion of the court.

Mr. Charles M. Da Costa for the appellants.

Mr. H. E. Davies, Jr., contra.

MR. JUSTICE MILLER delivered the opinion of the court.

On the fifth day of February, 1874, a petition in bankruptcy was filed in the proper court against Thomas Morrell and C. Cuyler Campbell, and they were duly adjudicated bankrupts. Rasin was appointed assignee, and brought the present

suit, alleging that the defendants, Auffm'ordt & Co., had received by way of preference certain securities from the bankrupts with knowledge of their insolvent condition. A decree for the value of the securities was rendered in his favor, from which this appeal was taken.

The testimony leaves no doubt that the transaction was intended as a security for an existing debt, and that the appellants had reasonable cause to believe that Morrell and Campbell were insolvents. Indeed, it is very clear that the decree must be affirmed, unless the period which elapsed between the receipt of the securities and the beginning of the bankruptcy proceedings was, under the bankrupt law, sufficient to protect the appellants.

The securities were received on the 15th of November, 1873. The period fixed by the act then in force was four months. As the petition in bankruptcy was filed Feb. 5, 1874, the lapse of time is clearly no defence under that act. But Congress, on the twenty-second day of June, 1874, passed an amendatory act, in which is found this clause: "That in cases of involuntary or compulsory bankruptcy the period of four months mentioned in section 35 of the act to which this is an amendment, is hereby changed to two months, but this provision shall not take effect until two months after the passage of this act."

This suit was commenced May 11, 1875, and in the answer of defendants the lapse of two months from the receipt of the securities to the filing of the petition in bankruptcy is pleaded. There is, however, no allegation in the answer or in the bill, nor do we find any record evidence that the petition was filed by creditors, or anything to show whether it was a case of voluntary or involuntary bankruptcy.

The case, however, has been argued by counsel on both sides as if it were the latter, and we will so treat it. This raises the question whether the law as it stood before the amendment of 1874, or the time prescribed in that amendment, governs the rights of the parties in this suit.

It is to be observed that the full period of four months from the receipt of the securities had passed — indeed, more than six months had passed — before the enactment of this amend

ment, and the bankruptcy proceeding had been initiated within that period and the assignee appointed. The rights of the parties were therefore fixed before the new law was passed. The assignee had a vested right to the securities, or to their value. The legal obligation to return them or to pay him their value had been incurred by the defendants. To hold that Congress intended by this amendatory statute to take away that right of action, is to hold that it intended by a retrospective statute to destroy a vested right of property or an existing right of action. If it be conceded that Congress could do this, the principle is too well established to need the citation of authorities, that no law will be construed to act retrospectively unless its language imperatively requires such a construction. We think the clause in the act of 1874 under consideration not only does not require this, but that such an inference is fairly negatived by the provision that the clause shall not take effect until two months after the passage of the act. The evident purpose of this provision was that in cases where such a transfer has been made as sect. 35 of the original act forbids, but had not at the date of the act been covered by the lapse of four months without the initiation of proceedings in bankruptcy, that provision should remain the law of such cases for two months after the act was passed, though it became immediately the rule as to preferences made after its passage. Congress thus showed its intent to provide one rule for cases where the lapse of time had not yet cured the unlawful transfer made before its passage, and the rule for such transfers made after its passage, leaving by a very strong inference cases where the rights of parties had been fixed under the old law to be governed by its provisions.

There is no question but what Congress could by a statute have limited the time within which an action should be brought in the future, so as to have barred the present action, which was commenced nearly a year after the new law went into effect. But this statute is not a statute of limitation of actions, but a declaration of a period when an act otherwise voidable shall be held to be valid; and we see no reason to believe that in making a new rule on that subject Congress intended to

make it retrospective, for the purpose of destroying rights of property or rights of action which had become vested before the passage of the law.

Decree affirmed.

UNITED STATES v. GOLDBACK.

1 A manufacturer to whom, pursuant to sect. 3425 of the Revised Statutes, the Commissioner of Internal Revenue sells proprietary stamps on credit is not, in default of payment therefor, accountable for public money, and does not forfeit the commissions to which he is, under that section, entitled.

2. Where the manufacturer when sued paid into court the amount due upon the stamps after deducting his commissions, and it was then stipulated that the case should be submitted, the only point in issue being as to his right to them, — *Held*, that the United States was not entitled to judgment for the costs which accrued after the date of such payment.

ERROR to the Circuit Court of the United States for the Eastern District of Virginia.

The facts are stated in the opinion of the court.

The Solicitor-General for the plaintiff in error.

No counsel appeared for the defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Goldback was a manufacturer of friction-matches, and as such gave bond to the United States, under sect. 3425 of the Revised Statutes, with the other defendants in error as his sureties, to pay such amounts as might from time to time be due from him for proprietary internal revenue stamps supplied him on a credit, in accordance with the provisions of that section. Under the law he was entitled to an allowance on the aggregate amount supplied him, as discount on the face value, or commission. Stamps were furnished him from time to time on the faith of this security; and when this suit was begun the balance against him, without any allowance for discount or commission, was $3,369, but deducting the commission the amount due was $3,062.72. Pending the suit he paid in full this last-named sum, and then, without any formal plead-

ings, the facts were agreed on and submitted to the consideration of the court, with the statement that the only point in issue was "as to the right of the defendant, Goldback, to commissions under the provisions of sect. 3624 of the Revised Statutes of the United States." Judgment was given in favor of the defendants so far as the commissions were concerned, but in favor of the United States for costs to Nov. 20, 1876, the date when the payment of the amount due was made. To reverse this judgment, so far as it is in favor of the defendants, this writ of error has been brought.

Sect. 3624 of the Revised Statutes provides that "whenever any person accountable for public money neglects or refuses to pay into the treasury the sum or balance reported to be due to the United States, upon the adjustment of his account, the First Comptroller of the Treasury shall institute suit for the recovery of the same, adding to the sum stated to be due on such account the commissions of the delinquent, which shall be forfeited in every instance where suit is commenced and judgment obtained thereon, and an interest of six per cent per annum from the time of receiving the money until it shall be repaid into the treasury."

Goldback never received and was not accountable for any public money. He bought stamps at a certain discount and agreed to pay for them at a future day, giving the bond sued on as his security. He did not pay as he agreed, and he and his sureties were sued for what he owed. He had no moneys which in any legal sense belonged to the United States. He owed a debt for stamps bought at a certain percentage below their face value. Money in his hands was no more the property of the United States than that of any other debtor is the property of his creditors. The stamps when bought were his own, to do with as he pleased. The United States could not call on him to account for them. He was bound to pay for them at the time agreed on, whether used or not. What the statute denominates commissions were in fact discounts from the face value of the stamps sold, on account of the quantity purchased. We think it clear, therefore, that the court below was right in holding that the United States could not recover for these allowances, though called commissions.

Neither do we see any error of which the United States can complain in respect to the costs. Full costs were recovered up to the time the debt was paid. This implies that after that time each party must pay his own costs. It is clear a plea of payment *puis darrien* was waived, because the parties, when submitting the case, agreed on the fact of payment after the suit was commenced, and in terms said that the only issue between them was in respect to the commissions. This stipulation as to what the issue was is equivalent, for the purposes of review here, to an admission of record that proper pleadings had been filed to raise that issue.

Judgment affirmed.

WELLS v. SUPERVISORS.

1. According to the ruling of the highest court of Mississippi, the financial powers conferred by the general law upon boards of supervisors of counties in that State do not include that of borrowing money.
2. The bonds of a municipal corporation issued in payment of its subscription to the stock of a railroad company are void, unless the statute confers in express terms, or by reasonable implication, authority to issue them.
3. The laws of Mississippi bearing upon the right of the authorities of Pontotoc County to subscribe for stock in the Selma, Marion, and Memphis Railroad Company (formerly known as the Memphis, Holly Springs, Okolona, and Selma Railroad Company), stated and considered, and the conclusion reached, that the bonds issued July 1, 1877, in payment of such subscription, and reciting that they are "issued under and pursuant to an order of the board of police of said county of Pontotoc, now known as the board of supervisors of said county, made under the authority of the Constitution and laws of said State of Mississippi, authorized by a vote of the people of said county at a special election held for the purpose on the twentieth day of November, A.D. 1869," are void, there having been no authority of law to issue them.
4. *Lynde* v. *The County* (16 Wall. 6) distinguished.

ERROR to the District Court of the United States for the Northern District of Mississippi.

The facts are stated in the opinion of the court.

Mr. George Perkins for the plaintiff in error.

Mr. Van H. Manning, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

On the 10th of March, 1852, the legislature of Mississippi passed an act to incorporate the Mississippi Central Railroad Company. Sects. 17 and 18 of that act are as follows: —

"SECT. 17. Be it further enacted, that the boards of police of the several counties of Madison, Holmes, Carroll, Yallabusha, Lafayette, and Marshall, together with such other counties as are adjoining or adjacent to the counties through which said railroad may pass, may for their respective counties subscribe for capital stock in said railroad, not to exceed in amount two hundred thousand dollars for any one county: *Provided, however*, that an election shall be holden in the county for and on account of which said stock is proposed to be subscribed, by the qualified electors thereof, at the regular precincts of said county, ten days' notice of the time of holding such election, and of the amount proposed to be subscribed, being first given by the board of police; and if at such election a majority of the qualified electors voting shall be in favor of such subscription, then said board shall make such subscription for and in behalf of the county for the amount specified; but if a majority of those voting shall be opposed to such subscription, the same shall not be made.

"SECT. 18. Be it further enacted, that said several boards of police, either before or after any election held as provided in the seventeenth section of this act, may direct, that whenever any tax shall be collected in their respective counties for the payment of the capital stock so subscribed by the county, which tax the several boards of police are hereby authorized to assess and collect from the taxable property or real property of the county as said board may elect; that the sheriff or tax-collector shall issue to the person paying such tax a certificate specifying the amount of tax so paid, and on account of what railroad the same is paid, which said certificate or certificates shall be transferable by indorsement; and whenever any person, either by payment of taxes as aforesaid, or by indorsement as aforesaid, shall hold a certificate or certificates, in amount equal to one or more shares of the capital stock of said railroad company, he may present the same to the treasurer of said company, who shall thereupon take up the said certificate or certificates and issue to the holder of them certificates for one or more shares of stock in said company, and such holder of said certificate

of stock shall be for such stock substituted to the right of the county as a stockholder to the number of shares named in said certificate."

On the 19th of April, and during the same session of the legislature, a supplemental act was passed, by which, if the act should be approved by a vote of the several counties through which the road might be located, a tax of five per cent on the assessed value of all lands lying within five miles, and two and one half per cent on all lying over five miles and under ten, of the road, was to be collected annually for a term of four years to aid in the construction of the road. Sect. 4 of this act is as follows: —

"SECT. 4. Be it further enacted, that whenever any sheriff or tax-collector shall collect any tax by virtue of this act, he shall give to the person or persons paying the same a certificate therefor, which certificate shall be transferable by indorsement; and whenever any person or persons, either by payment of taxes as aforesaid, or by indorsement as aforesaid, shall hold a certificate or certificates in amount equal to a share of the capital stock of said railroad company, he may present the same to the treasurer of said company, who shall thereupon take up the said certificate or certificates, and issue to the holder of them a certificate for a share of stock in said company, which certificate shall entitle such person to all the rights and privileges of a stockholder in said railroad company."

On the 23d of November, 1859, the Memphis, Holly Springs, and Mobile Railroad Company was incorporated. Sect. 7 of that act of incorporation gave authority to the board of directors "to issue, sell, negotiate, mortgage, pledge, or hypothecate the bonds or notes of the company, as well as any notes, bonds, scrip, certificates, or other property for the payment of money, or other property which said company shall or may receive as donations, or in payment of subscriptions to the capital stock of said company, or other dues thereto." Sect. 8 provided that the board of directors might require each subscriber, at the time of subscribing, or at any time thereafter, to pay a part, not exceeding ten per cent, of his subscription to the capital stock in cash, and that no further payment should be demanded

until in the opinion of the board a sufficient amount of the capital stock had been subscribed, with the means and credits of the company, to construct the road. No calls were to be made except on thirty days' notice, and the amount called for at any one time could not exceed thirty per cent to each subscriber of the amount of his subscription. Sect. 15 is as follows: —

"SECT. 15. Be it further enacted, that the sects. 17 and 18 of an act passed by the legislature of this State, and approved March 10, 1852, entitled 'An Act to incorporate the Mississippi Central Railroad Company,' regulating county subscriptions to the capital stock of said company, be, and the same are, adopted as part of this act, so far as the provisions of the same may be applicable."

By sect. 16 the company was authorized to consolidate with other railroad companies.

No organization is shown to have been perfected under this act, and, Feb. 20, 1867, another act was passed, of which the title and the only portion pertinent to this case are as follows: —

"*An Act to revive and amend an Act entitled 'An Act to incorporate the Memphis and Holly Springs and Mobile Railroad Company,' approved Nov.* 23, 1859, *and for other Purposes.*

"SECT. 1. Be it enacted by the legislature of the State of Mississippi, that the above-recited act be, and the same is hereby, revived, and that the style of said railroad company shall hereafter be known as the 'Memphis, Holly Springs, Okolona, and Selma Railroad Company;' and, as many of the original incorporators are now dead, that N. B. Forrest" [&c.] "all of the State of Mississippi, together with those who may hereafter become stockholders, their successors, &c., shall be said corporators.

"SECT. 2. Be it further enacted, that said company shall have sixteen years in which to construct the said road, and shall commence the same in three years from and after the passage of this act."

When these several acts were passed, the Constitution of Mississippi, adopted in 1832, was in force. This constitution contained no limitation on the power of the legislature to

authorize counties to become stockholders in, or to lend their credit to, railway or other corporations. A new constitution went into effect in 1868, art. 12, sect. 14, of which is as follows: —

"The legislature shall not authorize any county, city, or town to become a stockholder in, or lend its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a special election, or regular election, to be held therein, shall assent thereto."

At a special election held for that purpose on the 20th of November, 1869, the people of the county voted a subscription to the capital stock of the Memphis, Holly Springs, Okolona, and Selma company, and on the 21st of July, 1870, the name of the company was changed by a special act of the legislature to the Selma, Marion, and Memphis Railroad Company.

On the 19th of April, 1872, a general act was passed "to authorize counties, cities, and towns to subscribe to the capital stock of railroads," which gave any county through which any railroad should pass authority to subscribe any sum to the capital stock, if two-thirds of the legal voters should give their assent in the manner specially provided for. Such subscriptions were to be paid in the twenty-year coupon bonds of the county, bearing interest at the rate of seven per cent per annum. Taxes were to be levied and collected to pay the principal and interest of these bonds as they matured; and it was further also provided "that certificates of shares in the capital stock of said companies shall be issued to all persons paying taxes for the principal and interest of said bonds, to the amount paid by them, whenever the receipts for the taxes so paid shall be equal to one or more shares of the capital stock."

Under date of July 1, 1872, the board of supervisors of Pontotoc County, which was the legal successor of the board of police, under the authority of the vote of Nov. 20, 1869, issued to the Selma, Marion, and Memphis Railroad Company coupon bonds having twenty years to run, and bearing interest, payable semi-annually, at the rate of eight per cent per annum, amounting in the aggregate to $150,000. The plaintiff being

the holder for value of a large amount of the coupons of these bonds, payable January and July, 1873, and January, 1874, which were not paid on presentation at maturity, brought this suit for their recovery. The court below gave judgment against him as on demurrer to the declaration, which presented substantially the foregoing facts, and to reverse that judgment this writ of error has been brought.

The controlling question in this case is whether there was authority in law for issuing the bonds to which the coupons sued on were attached. If there was not, it has always been held that no recovery can be had in an action on the bonds or coupons. It is also settled that unless the power to issue bonds for the payment of municipal subscriptions to the stock of rail road companies is given in express terms, or by reasonable implication, no obligation of that kind can be created.

In Mississippi, as a general rule, the boards of supervisors of counties have no other financial powers than "to levy such taxes as may be necessary to meet the demands of their respective counties," and to "direct the appropriation of the money that may come into the treasury." Code (1880), sects. 2148 and 2158; Code (1857), c. 59, sect. 4, arts. 16, 30. This, it has been held by the highest court of the State, gives no power to borrow money. In *Beaman* v. *Leake County* (42 Miss. 247), decided in 1868, the court, referring to an act then under consideration, passed in December, 1863, but which in no manner affects this case, said, "The act just referred to is the only one of a general nature empowering boards of police to borrow money, and without some such act they could not lawfully do so in their official characters." The policy of the State from its earliest history seems to have been to require municipal organizations to meet their current liabilities by current taxation; and in *Hawkins* v. *Carroll County* (50 id. 762) it was expressly declared that "the grant of power to such a body of an extraordinary character, such as is not embraced in the general scope of its duties, must be strictly construed."

Such being the general law of the State, we come to consider the special legislation on which this case depends, that is to say, sects. 17 and 18 of the act of 1852, in connection with the other provisions of the act of 1859, into which these

sections were incorporated by adoption. Undoubtedly sect. 17 authorized a subscription to the stock of the railroad company for the county, after a majority of the electors of the county had in the proper way given their consent, and it is possible, if there had been nothing more, that, under the rule of construction stated in *Lynde* v. *The County* (16 Wall. 6), the subscription might have been paid in bonds. It seems to us, however, that the provisions of sect. 18 are such as to exclude any such presumption. By that section the boards of police (supervisors) were authorized to assess and collect a tax on the taxable property or the real property of the county, at their election, "for the payment of the capital stock so subscribed." No other mode of payment was provided for. This of itself, when considered in the light of the settled policy of the State to require the current liabilities of counties to be discharged by current taxation, would seem to indicate an intention not to confer upon the counties the power of funding this kind of liability. But when it is taken in connection with the further provision of the same section, which authorizes the boards of police to direct that the railroad company issue to the tax-payers, in lieu of the county, stock to the amount of their taxes paid, the intention is even more apparent. As stock was to be issued by the company to an amount equal to the taxes paid, it would seem as though it could not have been supposed that before the tax was collected any payment of the subscription was to be made, or any stock issued, that could in any manner interfere with this privilege of the tax-payers. So, too, the company could only be required to issue stock upon and to the amount of the subscription. As the tax-payer was to be entitled to stock to the full amount of his payment, it follows that the tax must have been intended to pay the subscription, and not bonds. We are not unmindful of the fact that the language of this part of the section is such as to leave it optional with the board to give this direction or not; but it may nevertheless be referred to, as we think, to strengthen the presumption arising from the other provisions, that the subscription was not to be paid through taxation, directly or indirectly, until the money to be raised in that way had actually been collected. This statute conferred an extraordinary power

on the boards of police. It authorized them to create a new liability for their respective counties, and provided a special way of discharging that liability. The liability and the mode of discharge were provided for in the same statute. This being so, the mode prescribed is exclusive of all others.

This case differs materially from *Lynde* v. *The County*, *supra*. There the tax voted was to be levied annually during a period not exceeding ten years, and the amount for each year definitely fixed. As this was done for the purpose of building a court-house, the court very properly held the vote implied permission to borrow money to accomplish the object in anticipation of the collection of the tax, which must necessarily be delayed a considerable number of years. Here the tax was to be levied to pay the subscription, that is to say, to pay the company the amount subscribed when, by the terms of the subscription, that obligation was to be met. As the statute on its face contemplated no delay in raising the money by taxation, no implication of a power to borrow in anticipation of the tax can arise. The subscription might be made, but the money must be raised by taxation to meet it. The railroad company cannot complain; for when it received the subscription it knew, or ought to have known, from what source the money was to come to meet the payment, and it impliedly gave its consent to such delays as were necessarily incident to the mode of collection. The other provisions of the charter, as to calls on subscribers to meet their subscriptions, were not necessarily applicable to counties. Counties were to pay as they agreed, and when the tax was collected.

It may be true, as is urged, that the collection of the full amount of the subscription in a single year would be oppressive, but it by no means follows that this must necessarily have been done. These sections are to be construed in the act of 1859 precisely as they would be in that of 1852, except so far as they may have been modified by the other provisions in 1859. The original act of 1852 is to be considered in connection with the supplemental act passed a little later. Being *in pari materia*, and enacted at the same session of the legislature, they are to be taken together as one law. From the supplemental act it is apparent that the object of the legislature was

to raise money by taxation to aid in the construction of the road, and to require the company to give the tax-payers stock for the money they paid. This is entirely inconsistent with any idea of the payment of interest. As the special tax on adjoining lands was large, it was extended over a period of years. This amount was fixed, and not left to the discretion of any one. In respect to the country at large the plan adopted was different. There it was left for the people to determine for themselves how much the subscription should be, and for the county and the company to agree when it should be paid. In this way the tax might be extended over a series of years; but as stock was to be issued by the company for all payments made, it could not have been intended to tax beyond the actual amount of the subscription. Consequently, if time was given by the company to make the payment, it must be without interest.

This construction of the act is strengthened by what actually happened. The revived and amended charter was passed in 1867, and the subscription voted in 1869. When the subscription was made does not appear, but certain it is that no bonds were issued to make the payment until after the policy of the State in respect to funding this class of liabilities was changed by the act of 1872. Then, although confessedly that act did not apply to this case and its provisions were not followed, the subscription was paid by binding the tax-payers of the county to pay in the aggregate $390,000, instead of $150,000, as was voted. This we think could not be done.

It is further argued that, because the seventh section of the act of 1859 authorized the railroad company to sell any *bonds* it might receive as donations or in payment of subscriptions, the power of counties to issue bonds in payment of their subscriptions must be inferred. We cannot so understand that provision. This gave power to sell bonds if in the course of business they should get to be the property of the company, but the implied prohibition against their issue by counties still remains.

It is also said that the provision in sect. 18 for giving individual tax-payers stock for the amount of their taxes paid can not be considered as in any manner precluding an implication

of the power to issue bonds, because the same provision is found in sect. 4 of the act of 1872. There is this difference between these provisions of the two acts: in that of 1852 the railroad company is to issue the stock to the tax-payer, while that of 1872 simply says that certificates of shares shall be issued, without saying by whom. But it is not for us at this time to determine the legal effect of that part of the act of 1872. Power to issue bonds is given in express terms by that act, and stock was to be issued to all persons "paying taxes for the principal and interest of said bonds;" while in the act of 1852 the tax was to be collected "for the payment of the capital stock so subscribed," and stock was to be issued by the company to the persons holding certificates of the payment of this tax.

On the whole, we think the court below was right in holding that the issue of bonds in this case was not authorized by law. Different questions will arise if the railroad company, or any one who has been subrogated to the rights of the company, shall attempt to enforce the payment of the original subscription by the county.

Judgment affirmed.

OGDEN v. COUNTY OF DAVIESS.

1. An act of the General Assembly of Missouri, approved Jan. 4, 1860, authorizes counties, towns, and cities to subscribe to the stock of a railroad company which it incorporated, and issue bonds in payment therefor. The seventh section enacts that "upon the presentation of a petition of the president and directors of said company to the county court of any county through which said road may be located, praying that a vote may be taken in any strip of country through which it may pass, not to exceed ten miles on either side of said road; that the inhabitants thereof are desirous of taking stock in said road and of voting upon themselves a tax for the payment of the same, — it shall be the duty of said county court to order an election therein, and shall prescribe the time, place, and manner of holding said election; and if a majority of the taxable inhabitants shall determine in favor of the tax, it shall be the duty of said court to levy and collect from them a special tax, which shall be kept separate from all other funds and appropriated to no other purposes, and as fast as collected shall cause the same to be paid to the treasurer of said com-

pany." *Held*, that the affirmative vote of the inhabitants of such a strip authorized the county court to levy, collect, and pay over to the treasurer of the company such special tax, but it did not create a debt of the county, as such, for which bonds might be issued under that act or the act of March 24, 1868, authorizing "counties, cities, and incorporated towns to fund their respective debts."

2. The act of March 24, 1870, entitled "An Act to amend an act to facilitate the construction of railroads in the State of Missouri, approved March 23, 1868," granted no new power of subscription. The act of 1868 related entirely to municipal townships as such.

3. The court reaffirms its former rulings that the holder of a municipal bond is chargeable with notice of the statutory provisions under which it was issued.

ERROR to the Circuit Court of the United States for the Western District of Missouri.

The facts are stated in the opinion of the court.

Mr. Joseph E. Merryman for the plaintiff in error.

Mr. Willard P. Hall, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

On the 4th of January, 1860, the General Assembly of Missouri incorporated the Platte City and Des Moines Railroad Company, now, by statutory change of name, the Chicago and Southwestern Railway Company. Sect. 7 of the charter is as follows: —

"SECT. 7. Upon the presentation of a petition of the president and directors of said company to the county court of any county through which said road may be located, praying that a vote may be taken in any strip of country through which it may pass, not to exceed ten miles on either side of said road; that the inhabitants thereof are desirous of taking stock in said road and of voting upon themselves a tax for the payment of the same, — it shall be the duty of said county court to order an election therein, and shall prescribe the time, place, and manner of holding said election; and if a majority of the taxable inhabitants shall determine in favor of the tax, it shall be the duty of said court to levy and collect from them a special tax, which shall be kept separate from all other funds and appropriated to no other purposes, and as fast as collected shall cause the same to be paid to the treasurer of said company."

On the 4th of July, 1865, a new constitution of Missouri went into effect, sect. 14, art. 11, of which is as follows: —

"The General Assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto."

By an act to facilitate the construction of railroads, passed March 23, 1868, municipal townships in any county of Missouri were authorized to subscribe, through the county court of the county, to the stock of railroad companies, with the assent of two-thirds of the qualified voters of the township, and to pay their subscriptions with bonds in the name of the county, payable out of a special tax to be levied on the real estate of the township. On the 24th of March, 1870, the General Assembly amended this law by adding the following as sect. 7: —

"In all cases where, by the provisions of the charter of any railroad company organized under the laws of this State, the taxable inhabitants of a portion of a municipal township of any county in this State have voted, or may hereafter vote, to take stock in such railroad company, they are hereby declared entitled to, and shall have, all the privileges, rights, and benefits in said act conferred upon counties or townships, and the county court of such county shall exercise the same powers and perform the same duties in issuing bonds, levying, collecting, and paying over the taxes which it is required to in the case of a county or township under the provisions of said act: *Provided, however*, that no part of such township outside the limits of the district voting shall be taxed to pay any of the bonds or coupons so issued by the county court. This act shall take effect from its passage."

After the passage of this act, the Daviess County Court, on the petition of the Chicago and Southwestern Railway Company, ordered an election on the twenty-first day of June, 1870, to obtain the assent of the "taxable inhabitants living within a strip of five miles on each side of the line of said railway to be built through the county of Daviess, . . . to the

subscription by the county of Daviess, for and on behalf of the taxable inhabitants of said strip, of the sum of $60,000 of the capital stock of said railway company, on such terms and conditions as" the court "should deem proper." Thereupon the court fixed, as one of the conditions of the subscription, that "in payment of said subscription sixty bonds shall be issued by said county to the Chicago and Southwestern Railway Company, . . . of $1,000 each, payable ten years after date, with interest at the rate of eight per cent per annum, evidenced by semi-annual coupons," &c. The election was held, and resulted in five hundred and sixty-eight votes for the subscription and four hundred against it. The county court subscribed the stock, and to pay the subscription issued and delivered to the company bonds in the following form: —

"UNITED STATES OF AMERICA.

"$1,000.] *State of Missouri, County of Daviess.* [$1,000.

"Daviess County Ten-year Bond, No. 8.

"Know all men by these presents, that the county of Daviess, in the State of Missouri, acknowledges itself to owe and be indebted to, and promises to pay the bearer the sum of one thousand dollars, on the first day of August, in the year of our Lord one thousand eight hundred and eighty, for value received, negotiable and payable without defalcation or discount at the Metropolitan National Bank, in the city and State of New York, with interest thereon from the first day of August, A. D. 1870, at the rate of eight per centum per annum until paid, which interest shall be due and payable semi-annually on the first day of February and August in each year, on the presentation of the proper interest coupon, as annexed hereto, attested by the signature of William M. Bostaph, clerk at the said Metropolitan National Bank. This is one of sixty bonds of like date, amount, and effect, numbered from one to sixty, both numbers inclusive, issued in payment of the indebtedness of said county of Daviess to the Chicago and Southwestern Railway Company, incurred on account of an election held in said county on the twenty-first day of June, A. D. 1870, by certain taxable inhabitants of said county.

"In testimony whereof, the said county of Daviess, by order of its county court, has caused these presents to be executed by the signature of the presiding justice of said court, attested by the

clerk thereof, with the seal of said county affixed, at office in Gallatin, Daviess County, Missouri, this twenty-seventh day of July, A. D. 1870.

"PETER BEAR, *Presiding Justice.*

"Attest: WILLIAM M. BOSTAPH, *Clerk.*"

{ SEAL OF DAVIESS COUNTY COURT, MO. }

The coupon is in words and figures following, to wit: —

"$40.] GALLATIN, Mo., July 27, 1870.

"County of Daviess, in the State of Missouri, will pay to the bearer forty dollars on the first day of February, 1873, at the Metropolitan National Bank, in the city and State of New York, for value received, being the semi-annual interest due on bond No. 3 of said county, issued to Chicago and Southwestern Railway Company.

"WILLIAM M. BOSTAPH, *Clerk.*"

When the delivery of the bonds was made, the interest coupons were cancelled to Sept. 1, 1871. The coupons for 1873 were not paid, and this suit was brought to recover what was due on that account. The plaintiff is a *bona fide* holder of the coupons. On the trial the judges of the Circuit Court were divided in opinion on several questions which have been certified here, the principal of which is whether there was lawful authority for the issue of the bonds. The presiding judge being of the opinion that there was not, judgment was given in favor of the county, and to reverse that judgment this writ of error was brought.

We think the presiding judge was right in the view he took of the controlling question in this case. Without doubt, sect. 7. of the charter of the company authorized the taxable inhabitants of the "strip of country" designated to vote a tax upon themselves to take stock, and required the county court to levy and collect such a tax, if voted, and pay over the money as fast as collected to the treasurer of the company; but in this we find no authority for the county to issue bonds in anticipation of the tax. The taxable inhabitants of the strip of country could not themselves make a bond, and all the county court could do was to collect and pay over the tax they

voted. The inhabitants were not even organized by themselves, much less made a body politic for any purpose. They could vote the tax, if called upon to do so by the county court, but that was all. The effect of their vote was nothing more than to authorize the county court to levy, collect, and pay over to the treasurer of the company the special tax they had determined upon. The requirement of the law — that the money, when collected, should be paid over to the treasurer of the company — is entirely inconsistent with any idea that the obligations to be met in this way were to be in the form of negotiable paper afloat on the market as commercial securities. Under the provisions of sect. 6 of the charter, counties, towns, and cities were expressly authorized to issue bonds in payment of their subscriptions. The omission of any such power in sect. 7 is conclusive evidence that nothing of the kind was intended in case of "strip" subscriptions. In this particular the case is even stronger than that of *Wells* v. *Supervisors*, *supra*, p. 625.

Neither did the act of March 24, 1870, give the power to issue bonds. That was an act amending what is commonly known as the "township aid law" of Missouri, which related only to subscriptions by municipal townships. The amendment granted no new power of subscription, but simply provided that where, under the charter of any railroad company, the taxable inhabitants of a portion of a municipal township had voted or might vote to take stock in the company, the county court might issue bonds for the stock so taken, to be paid out of taxes levied on property within the limits of the district voting. In the charter of the Chicago and Southwestern Company, authority was not given the taxable inhabitants of any portion of a township to take stock, but to the taxable inhabitants of any strip of country through which the road might pass, not exceeding ten miles on either side. This strip was not necessarily part of a township. It might include parts of several townships, or the whole of some and parts of others. As the act amended related entirely to municipal townships as such, and there had before been legislation in relation to strips of country without any reference to townships, it must be presumed that the amendment applied only

to parts of townships separately, and not to the aggregation of townships or parts of townships which would almost necessarily be included in a strip of country twenty miles wide or less along a railroad as it runs through a county. The bonds which this statute authorizes were to be issued on behalf of a portion of a township, not on behalf of a "strip of country." Under the charter, the taxable inhabitants of the strip were to take the stock, and they were to be taxed. We cannot, without a perversion of language, apply the act of 1870 to this provision of this charter. It follows that neither in the charter nor in the amending act relied on can there be found authority to issue the bonds in question.

On the 24th of March, 1868, the General Assembly of Missouri passed an act "to enable counties, cities, and incorporated towns to fund their respective debts." Sect. 1 of that act is as follows: —

"That the various counties of this State be, and they are hereby, authorized to fund any and all debts they may owe, and for that purpose may issue bonds bearing interest at not more than ten per centum per annum, payable semi-annually, with interest coupons attached; and all counties, cities, or towns in this State which have or shall hereafter subscribe to the capital stock of any railroad company, may in payment of such subscription issue bonds bearing interest at not more than ten per centum per annum, payable semi-annually, with interest coupons attached. The bonds authorized by this act shall be payable not more than twenty years from date thereof."

It is claimed that authority for the issue of the bonds can be found in this law. We do not agree to this. Neither the county, nor a city, nor a town took the stock now in question. The county did not owe any debt. The taxable inhabitants of the "strip of country" had authority to vote to tax themselves for the stock. In this way they could bind themselves; but that did not create a debt of the county, as such, for which funding bonds might be issued. The debt, if any, was of the "strip" only, and not the county. As no bond could be issued under the original vote, the county assumed no obligation whatever. The county court and other officers of the county could be compelled to levy, collect, and pay over the

tax, but that was all the county or its officers were required to do.

We have always held that every holder of a municipal bond is chargeable with notice of the provisions of the law by which the issue of his bond was authorized. If there was no law for the issue there can be no valid bond. On the face of these bonds it appears that they were issued to the Chicago and Southwestern Company on account of an election held by "certain taxable inhabitants of the county." This clearly connects the bonds with the Chicago and Southwestern charter, and indicates unmistakably that they were put out on account of a "strip" subscription. The holder is, therefore, chargeable with notice of the want of legal authority for their issue.

The principal question certified is answered in the negative, and, without specially replying to the others, further than may be implied from this opinion, the judgment is

Affirmed.

KAHN *v.* SMELTING COMPANY.

1 Where, under the practice established in Utah, issues are tried by the court, its findings of fact should be announced and filed before the entry of the judgment.

2. After such entry, an additional finding, made at the request of either party without notice to the other, forms no part of the record.

3. A member of "a mining partnership" may, without dissolving it, convey his interest in the mine and business.

4. In a suit to compel an account for the proceeds of a mining claim, a finding by the court that there was no such co-tenancy between the parties in the mine in controversy as to entitle the plaintiff to an accounting is a mere legal inference, and not a sufficient finding of fact upon which to base a decree.

APPEAL from the Supreme Court of the Territory of Utah.

The facts are stated in the opinion of the court.

Mr. John R. McBride and *Mr. George H. Williams* for the appellant.

Mr. Samuel Shellabarger and *Mr. Jeremiah M. Wilson*, *contra.*

MR. JUSTICE FIELD delivered the opinion of the court.

This is a suit to compel the defendants to account for the proceeds of a mining claim in Utah, known as the Montreal claim, and to pay over to the plaintiff the amount to which he may be entitled upon such accounting. The complaint alleges that on the 14th of December, 1874, the plaintiff and two other persons, by the name of Deronso and Berassa, were the owners and tenants in common of the claim, each having an undivided third; that they then entered into an arrangement to work the claim for the ores and metals it contained, and from that time until February, 1876, they were a mining partnership engaged in working the mine, bearing the expenses and sharing the profits equally, Deronso and Berassa having the immediate direction, control, and management of its working; that on the 1st of February, 1876, his associates sold and transferred their interest in the mine, and in the tools, implements, and appurtenances connected therewith, to the defendant, Isador Morris, through whom the other defendants immediately acquired all the rights they possess; that from that time until the 10th of April, 1876, the defendants were in full charge and possession of the property, and extracted from the mine and sold about sixteen hundred tons of ores, worth about $45,000, the expense of extracting and marketing of which did not exceed $10,000; that since the 1st of February the plaintiff has been a partner with the defendants in the mining claim and is entitled to his share of the profits made, — being one-third of the whole, — and has demanded of the defendants a statement of their work and an accounting, but they have refused to comply with his demand, or to give him any information on the subject or any share of the profits, and have denied him access to the books of account of the concern, and that the profits amount, according to his information and belief, to about $35,000. He therefore prays for a decree establishing the partnership between him and the defendants, and directing an accounting from them and the payment of the amount found due to him upon such accounting; and for such other and further relief as to the court may seem meet and equitable.

The answer of the defendants traverses the allegations of

the complaint, and avers that on the 31st of January, 1876, the defendant, Isador Morris, found Deronso and Berassa in the actual possession of a portion of the Montreal mine, of which they claimed to own two-thirds; that, believing they owned such interest, Morris paid to them $25,000 for it and received a quitclaim deed from them; that on the following day, for the like sum, he conveyed, by a similar deed, that interest to one Wadsworth in trust for such persons as a majority of the members of the Sandy Smelting Company of Salt Lake City might direct, and that afterwards such majority conveyed the same to the defendant, the Central Smelting Company, remaining, however, in the possession of and working the mine until about March 1, 1876, when the smelting company took possession of it and afterwards held it exclusively until the 1st of April following. The answer further avers that a short time prior to this last date the mine was claimed by another company, called the Old Telegraph Company, under an older location; that thereupon the Central Smelting Company and its vendors caused the prior location and the mining claim to be carefully examined by experienced miners, and upon that examination they became satisfied that the older location and the Montreal mine were one and the same vein or lode, and that the Montreal mine was owned by the holders of the earlier location; that having become thus satisfied of this fact, the Central Smelting Company abandoned the Montreal mine, and has not since held, used, or occupied the same, or exercised any acts of ownership over it.

The answer further avers that the defendants never worked the Montreal mine or extracted ore from it, under any agreement with the plaintiff, or by his advice or consent, or in conjunction with him or as his mining partners; that they have always refused to recognize him as a party in any work, labor, or management, or business of the mine; that the proceeds of the mine received by the Central Smelting Company and its immediate vendors, after deducting the expenditures, show a net profit of about $12,000, which the defendants hold until the determination of suits now pending between the plaintiff and the owners of the alleged earlier location; that those suits are brought to determine whether the Montreal mine and the

earlier location are one and the same lode, and which of the parties is entitled to its possession, and the proceeds; and the defendants pray for their protection that the prosecution of this suit may be restrained until those suits are determined.

On the trial, evidence was produced by both parties, and from it the court found as facts, —

First, That there was no partnership between the plaintiff and the defendants, as charged in the complaint.

Second, That there was no such co-tenancy between them in the mine in controversy as entitled the plaintiff to an accounting; and held, as a conclusion of law, that he had no right to recover in the action, and that the suit should be dismissed.

These findings were filed Nov. 21, 1877, and judgment upon them was entered the same day. From this judgment the plaintiff appeals to this court. Fourteen days after its entry the judge who heard the case, at the request of the plaintiff, filed further findings of fact. It does not appear that any notice was given to the defendants of any intended application to the court to make any findings in addition to those originally filed; and to make such findings without such notice was irregular. The practice, if permitted would lead to great abuses. It is not absolutely necessary in any case that the findings should accompany the announcement of the decision of the court; but, when they are required, — and by the practice established in Utah they are required in all cases where issues of fact are tried without a jury, — they should be filed before the entry of the judgment or decree, as in such cases upon them the judgment or decree rests. If either party is dissatisfied with them and desires more full or additional ones, he should, within a reasonable time during the same term, and before an appeal is taken or a writ of error sued out, apply to the court, upon proper notice to the adverse party, to make such fuller or additional findings; and if the application is granted, the additional findings should show on their face why they are made. The additional findings in this case not having been thus made, were properly stricken from the transcript. Taking, then, the original findings, let us examine whether they meet the issues raised by the pleadings and support the decree; for under the practice of Utah, where, in a case seek-

ing equitable relief, the facts are found by the court (and not by a master or a jury where the findings are merely advisory) they will be taken as its conclusions upon the evidence, and their sufficiency for the decree rendered will be considered.

The plaintiff avers that his association with his co-tenants of the mine was a mining partnership, and seeks to enforce his rights as a member of such partnership, and to obtain such other and further relief as he may be equitably entitled to. The opinion of the judge before whom the case was heard shows that he did not recognize the existence of any partnership in mines differing from ordinary partnerships, and his finding that there was no partnership, as alleged, between the plaintiff and the defendants, necessarily followed. The allegations of the complaint, whilst asserting a mining partnership, show that no other partnership existed after the sale of Deronso's and Berassa's interest. Such sale would have ended any ordinary partnership.

Mining partnerships as distinct associations, with different rights and liabilities attaching to their members from those attaching to members of ordinary trading partnerships, exist in all mining communities; indeed, without them successful mining would be attended with difficulties and embarrassments, much greater than at present. In *Skillman* v. *Lockman*, the question of the relation existing between parties owning several interests in a mine came before the Supreme Court of California, and that court said that "whatever may be the rights and liabilities of tenants in common of a mine not being worked, it is clear that where the several owners unite and co-operate in working the mine, then a new relation exists between them; and, to a certain extent, they are governed by the rules relating to partnerships. They form what is termed a mining partnership, which is governed by many of the rules relating to ordinary partnerships, but also by some rules peculiar to itself, one of which is that one person may convey his interest in the mine and business without dissolving the partnership." 23 Cal. 203. The same doctrine is asserted in numerous other cases, not only in that court, but in the courts of England. Associations for working mines are generally composed of a greater number of persons than ordinary trading partnerships;

and it was early seen that the continuous working of a mine, which is essential to its successful development, would be impossible, or at least attended with great difficulties, if an association was to be dissolved by the death or bankruptcy of one of its members, or the assignment of his interest. A different rule from that which governs the relations of members of a trading partnership to each other was, therefore, recognized as applicable to the relations to each other of members of a mining association. The *delectus personæ*, which is essential to constitute an ordinary partnership, has no place in these mining associations. *Duryea* v. *Burt*, 28 Cal. 569; *Settembre* v. *Putnam*, 30 id. 490; *Taylor* v. *Castle*, 42 id. 367. There are other consequences resulting from this peculiarity of a mining partnership, particularly as to the power of individual members to bind the association, upon which there is no occasion now to express any opinion. *Skillman* v. *Lockman*, *supra*; *Dickinson* v. *Valpy*, 10 B. & C. 128; *Ricketts* v. *Bennett*, 4 C. B. 686.

But if the relation of the plaintiff to his associates could not be considered as one of a mining partnership, he was still entitled to an accounting from them, if, as alleged by him, he was joint owner with them in the mine. They went into possession of the property under a conveyance from his co-tenants, and admit that whatever proceeds they have received from it were taken under a claim of ownership derived from that source. They have, upon their own averments, only a claim, in any event, to two-thirds of the proceeds; and if the plaintiff was a tenant in common with them, they can only refuse his demand to the other third by repudiating their own right to any portion. If a co-tenant, he had a right to call for an accounting, whatever might be the ultimate result of the claim of third parties to the whole proceeds as the owners of the mine under a prior location. He was, therefore, entitled to a finding on the question of his co-tenancy. The judge of the District Court seemed to recognize this position, for, after finding that there was no partnership, — following in this respect his peculiar notions as to the non-existence of such an association as a mining partnership, — he passed upon the claim to an accounting as a tenant in common of the mine with the defendants, and found "that there was no such co-tenancy

between the plaintiff and defendants in the mine in controversy as entitled the plaintiff to an account." This is not a sufficient finding of fact upon which to base a decree; it does not state that there was no co-tenancy between the parties; it implies that there was a co-tenancy; it only states that there was not such a one as entitled the plaintiff to an accounting. This is a mere legal inference, not the finding of a fact. If a co-tenancy of any kind existed, it is a question of law whether or not it entitles one co-tenant to an accounting from the others.

In considering the whole case, we think that justice will be subserved by a new hearing. The defendants recognize the possibility of the plaintiff ultimately establishing his right to a portion of the proceeds of the mine in their hands against the claimants of the alleged earlier location. They aver that they hold the proceeds subject to the determination of pending suits between those parties. The present decree, if affirmed, would cut off any claim of the plaintiff even should he prevail in that litigation.

The decree will be, therefore, reversed, and the cause remanded with direction to the Supreme Court of the Territory to send it to the District Court for a new hearing, the parties to be at liberty to produce new proofs; and it is

So ordered

TRIMBLE v. WOODHEAD.

Glenny v. *Langdon* (98 U. S. 20) reaffirmed.

APPEAL from the Circuit Court of the United States for the District of Kentucky.

The facts are stated in the opinion of the court.

Mr. John G. Carlisle for the appellant.

Mr. Stanley Matthews and *Mr. William M. Ramsey, contra.*

MR. JUSTICE MILLER delivered the opinion of the court.

The appellant, James S. Trimble, who was complainant below, brought his bill in chancery, which was dismissed on final hearing upon it, the answer, replication, and proofs.

Its substance is that Joshua Woodhead was largely indebted to the complainant for government bonds and money loaned, and that the judgment which had been rendered against him therefor proved unavailing; that Ann Woodhead, his wife, held the legal title to certain valuable lands, which were purchased with his money, and conveyed to her with intent to defraud his creditors; and that valuable improvements had been placed on the lands, the payment for which was made with his money. It prayed that the lands be subjected to sale for the payment of the judgment.

The answer of Ann denied all this, and also set up as a bar to the relief prayed a former suit in one of the State courts concerning the same subject between the same parties. The record of the proceedings in the State court is set out in full, and much evidence on both sides as to the main allegation of fraud alleged in the bill in the present suit is found in the record, all of which, in the view we take of the case, is immaterial.

The defendant, Joshua, answered "that long before the bringing of this suit this defendant had filed his petition in this honorable court under the bankrupt law of the United States, and the said orator, the said James S. Trimble, was duly notified of the same, and the claim of the said orator was therein set forth, and after the proper proceedings as prescribed in said law, this defendant was on his petition adjudged a bankrupt, and by a judgment of this court he was finally discharged from all of his indebtedness, and the claim of the orator was one of the debts from which he was thus discharged; he files herewith a copy of his judgment of discharge as part hereof."

The proceedings in bankruptcy are not set forth in this record, nor have we been able to find in it a copy of Woodhead's discharge; but his answer is sworn to. The complainant also filed an amended bill, making John T. Levis, the alleged assignee in bankruptcy of Joshua, a defendant, and he says that the judgment in the State court was rendered in his favor after Joshua's discharge as a bankrupt.

It may, therefore, be accepted as established by the pleadings that Woodhead was regularly discharged of all his debts

by proceedings in bankruptcy, and that in those proceedings John T. Levis was made the assignee with the usual effect of such an appointment.

It is as well to observe here that while the amended bill of the complainant made Levis a defendant in his character of assignee, and the record shows an order of court for process to issue, no writ, nor any other notice to him, nor the entry of his appearance in person or by attorney, is found in the record. As to him, therefore, and the rights which he represented, the bill is of no effect.

The case of *Glenny* v. *Langdon* (98 U. S. 20) conclusively establishes the proposition that the rights asserted in this bill passed to the assignee in bankruptcy, and that a creditor of Woodhead cannot assert them in his own name.

In that case the complainant sought to avoid this difficulty by alleging that he had requested the assignee to bring suit or assert the right in some other way, who had refused to do so. That made a stronger case than the present one, where no such application was made. The abortive effort to make the assignee a party without the service of process or an appearance for him does not help the case.

Nor can we attach much importance to the allegation in the amended bill, that two years had elapsed without suit by the assignee; for he might not have discovered the fraud, or if brought judicially into court might have asserted his right not only against the complainant but against Mrs. Woodhead, for the benefit of all her husband's creditors.

We do not see on what principle the failure of the assignee to sue within two years transfers his right of action to the complainant.

The right was certainly in the assignee, and, if barred by the Statute of Limitations, would, if it had any effect on the title, make good the title of defendant. *Meeks* v. *Olpherts*, 100 U. S. 564. It seems to be well settled that, in regard to real estate, the undisturbed possession of the wrong-doer for the time necessary to bar the action vests of itself a good title in the party holding such possession.

It would be a curious application of this principle in the present case, which concerns real estate, to hold that this same

lapse of time, instead of making good the defendant's title, or acting as a bar to the right to bring suit, transfers that right to another unimpaired by the lapse of time.

Nor is the creditor of a bankrupt without remedy in such a case as the present. If he is aware of the existence of property or credits, which should rightfully go to the assignee for the benefit of the creditors, he should inform the assignee of all he knows on the subject, and request him to proceed, by suit if necessary, to recover it. If he declines, a petition to the court of original jurisdiction would, if a proper case was made, compel the assignee to proceed. *Glenny* v. *Langdon*, *supra*. Indeed, the whole question is so fully considered in that case that little more need be said.

We may, however, suggest consequences readily to be seen if any other doctrine were held.

The primary object of the bankrupt law is to secure the equal distribution of the property of the bankrupt of every kind among his creditors. This can only be done through the rights vested in the assignee and by the faithful discharge of his duties. Let us suppose, however, that a creditor is aware of the existence of property of the bankrupt sufficient to satisfy his own debt, which has not come to the possession or knowledge of the assignee. He has but to keep silence for two years, and then bring suit in his own name against the fraudulent holder of this property, and make his debt really at the expense of the other creditors; or he may have an understanding with the bankrupt, who, after two years, and after his own discharge from all his debts, may confess judgment to this creditor and furnish him the evidence to prove the fraud, and thus secure him a preference forbidden by the act itself.

In the present case, if any right exists to subject this property in the hands of Ann Woodhead to the payment of the debts of her husband, which existed prior to the bankruptcy proceedings, that right is in the assignee, and such right is not divested by anything shown in this case.

The bill of the appellant was, therefore, properly dismissed.

Decree affirmed.

BARRETT v. HOLMES.

1. The right of entry of a party who claims under the treasurer's deed lands in Iowa sold for the non-payment of taxes is barred, if, within five years after the deed has been executed and recorded, he neither sues for nor takes possession of the lands.
2. A statutory provision to that effect is not in conflict with the Constitution of the United States.

ERROR to the Supreme Court of the State of Iowa.

This was an action for the recovery of real property, brought by the plaintiff in error Aug. 28, 1874, in the Circuit Court of Mills County, in the State of Iowa. He relied on a tax title based on the deed of the county treasurer to one Meads, dated Jan. 6, 1868, and recorded on the 28th of the same month; a deed from Meads to one Callanan, dated Feb. 1, and recorded March 12, 1873; and a deed from Callanan to himself, dated July 25, and recorded Aug. 3, 1874.

The defendant claimed under a bond for a deed, given by those who held the patent to the land. The bond was dated Feb. 12, 1872.

The law of Iowa prescribes how the deed of the treasurer or tax-collector for lands sold for taxes shall be executed, and its effect, as follows: —

"The deed shall be signed by the treasurer in his official capacity, and acknowledged by him before some officer authorized to take acknowledgments of deeds, and when substantially thus executed and recorded in the proper record of titles for real estate, shall vest in the purchaser all the right, title, interest, and estate of the former owner in and to the land conveyed, and all the right, title, interest, and claim of the State and county thereto, and shall be presumptive evidence in all the courts of this State, in all controversies and suits in relation to the rights of the purchaser, his heirs and assigns, to the land thereby conveyed, of the following facts: that the real property conveyed was subject to taxation for the years stated in the deed, &c., and shall be conclusive evidence of the following facts: that all things whatever required by law to make a good and valid sale, and to vest the title in the purchaser, were done," &c. Iowa Rev. 784; Code, 807.

The following statute of limitation was in force in Iowa when the tax deed under which the plaintiff in error claimed bore date, and when the suit was brought: —

"No action for the recovery of real property sold for the non-payment of taxes shall lie, unless the same be brought within five years after the treasurer's deed is executed and recorded as above provided (Rev. 784; Code, 807): *Provided*, that where the owner of such real estate sold as aforesaid shall, at the time of such sale, be a minor, or insane, or convict in the penitentiary, five years after such disability shall be removed shall be allowed such person, his heirs or legal representatives, to bring such action." Iowa Rev. 700; Code, 902.

The defence was the limitation of five years prescribed by the statute above quoted.

Upon the trial of the cause in the State Circuit Court, the jury returned special findings, from which it appeared that Love, the ancestor, who was the only defendant when the suit was brought, and who had died after its commencement, took possession of the land in controversy in March, 1872, and continued in possession until the trial, in November, 1875, and that the parties who during that period held the tax title to the land had no knowledge of such possession until June, 1874. The land was unoccupied and unimproved until the possession taken by Love.

There was a general verdict for the defendant, upon which judgment was entered.

The plaintiff appealed to the Supreme Court of the State, where he claimed that upon the conceded facts of the case, as above recited, and the findings of the jury, the five years' Statute of Limitations above quoted did not begin to run until there was an adverse possession of the land by the former owner or one claiming under him, and that if not thus construed the statute was in conflict with the Constitution of the United States.

The Supreme Court of Iowa found that the constitutional question was involved, but upheld the statute, and affirmed the judgment of the State Circuit Court. This writ of error is prosecuted to reverse that judgment.

Mr. George G. Wright for the plaintiff in error.

The ruling of the court below, that the Statute of Limitation of five years began to run from the time the treasurer's deed was executed and recorded, irrespective of the question of adverse possession, and that the entry of the former owner at any time before that period has expired, bars the right of the purchaser at the tax sale, is inconsistent with the language and obvious meaning of the statute and the later decisions of that court. Iowa Rev. 790; Code, 902; *Peck* v. *Sexton*, 41 Iowa, 566; *Lockridge* v. *Daggett*, 47 id. 679; *Moingona Coal Co.* v. *Blair*, 51 id. 447.

It not only deprives the plaintiff in error of his property without due process of law, but impairs the contract of purchase from the State.

Since it is a universal rule that an action for the recovery of real property, whether called "ejectment," or "an action of right," or what else, cannot be brought unless there is an adverse possession, it is clear that this action could not be brought until there was a mature right to enforce it in the proper court, and by the appropriate remedy. It follows, therefore, that under the laws of Iowa there could not be such mature right, nor was the appropriate remedy afforded, until the plaintiff's right to possession was denied, either by an actual adverse holding, or some act equivalent thereto. Blackwell, Tax Titles, 566.

A title is not barred by the mere failure to bring suit within the time limited; but there must have been an adverse possession. *Neddy* v. *State*, 8 Yerg. (Tenn.) 249; *Smith* v. *McCall*, 2 Humph. (Tenn.) 163; *Rice* v. *Nelson*, 27 Iowa, 148; *Waln* v. *Shearman*, 8 Serg. & R. (Pa.) 357.

A right without a remedy is unknown to the law. The statute cannot begin to run until there is an entry or possession which challenges the right of the owner. In other words, the entry must unequivocally denote an intent to take or assume actual possession. *Altemas* v. *Campbell*, 9 Watts (Pa.), 28.

There can be no such thing as an acquiescence in an adverse claim which will defeat a recovery, until such claim be asserted by entry. A party relying upon the bar of the statute must show that he has held the premises, not only by a

possession actual, open, and adverse, but that he has maintained it as a right resulting from an exclusive property in and dominion over them for the time limited by the statute. 3 Wash. Real Prop. 483; *McNamee* v. *Moreland*, 26 Iowa, 96; *Hollenbeck* v. *Riley*, 35 id. 105; *Larum* v. *Wilmer*, id. 244.

The tax sale under the statute had the effect of giving to the purchaser an original title, divesting all former interest in the land, and vesting in him an independent and paramount legal and equitable title in fee. By it a new and perfect title was established. This results from the authority of the State to levy taxes on property within her limits, and coerce payment by subjecting it to sale. It is one of the necessary and inherent rights of the sovereign power. Rev. 2207; Code, 1928; *Atkins* v. *Hinman*, 7 Ill. 449; *Dunlap* v. *Gallatin County*, 15 id. 7; *Irwin* v. *Trego*, 22 Pa. St. 368; *Luffborough* v. *Parker*, 16 Serg. & R. (Pa.) 351.

The formal execution and record of the tax deed which is the source of the title of the plaintiff in error being for land unoccupied, drew after it the possession, and it was unnecessary for him to bring an action, or do anything to vindicate his title or right to possession until another challenged it by entering into actual possession, or doing something in law which is equivalent thereto. *Dean* v. *Earley*, 15 Wis. 100; *Parish* v. *Eager*, id. 532; *Whitney* v. *Marshall*, 17 id. 174; *Gunnison* v. *Hoehne*, 18 id. 268.

In declaring that "no action for the recovery of real property sold for the non-payment of taxes shall lie unless brought within five years after the treasurer's deed is executed and recorded," the legislature could not have intended to prevent an action after the expiration of five years, in cases in which it was impossible that any measures could be taken in this form of action for the recovery within that time. The term "recovery" implies an adverse proceeding through the medium of the law, and the action for such recovery is utterly impracticable under the Iowa statute, except where there is an actual adverse possession. The owner of the tax title being by his purchase seised of the premises, theretofore and then unoccupied, could not be divested of the possession until entry by the

former owner or some one claiming title. Until then an action for the recovery did not accrue. *Waln* v. *Shearman*, *supra*; *Jackson* v. *Huntley*, 5 Johns. (N. Y.) 60; *Jackson* v. *McKee*, 8 id. 429.

No counsel appeared for the defendant in error.

MR. JUSTICE WOODS, after stating the case, delivered the opinion of the court.

The Supreme Court of Iowa has, by several decisions, construed the five years' Statute of Limitations, which is set up as a defence in this case, to apply to an action brought by one claiming under a tax deed, as well as to one brought by the original owner of the land. *Brown* v. *Painter*, 38 Iowa, 456; *Laverty* v. *Sexton*, 41 id. 435. And the court so ruled in this case. See *Barrett* v. *Love*, 48 id. 103.

By these decisions the Supreme Court of the State has established a rule of property in the State of Iowa which is binding on this and other courts of the United States. *Jackson* v. *Chew*, 12 Wheat. 153; *Beauregard* v. *New Orleans*, 18 How. 497; *Suydam* v. *Williamson*, 24 id. 427; *Nichols* v. *Levy*, 5 Wall. 433; *Williams* v. *Kirtland*, 13 id. 306.

So far, therefore, as this point is concerned, it must be considered as settled.

But the court further held that the limitation began to run at the time of the execution and recording of the tax deed, irrespective of the question of adverse possession, so that, if at any time during the period of five years, no matter how near its close, the former owner takes actual possession, and holds until the expiration of the five years from the date of the execution and recording of the tax deed, the right of the purchaser at the tax sale is completely barred.

The plaintiff in error claims that when thus construed the statute is in conflict with the Constitution of the United States: first, because it deprives the purchaser at a tax sale of his property without due process of law; and, second, because it impairs the obligation of the contract of purchase, of which the statute in force when it was made forms a part. Art. 5, Amendments to the Constitution, and sect. 10, art. 1.

The argument of the plaintiff in error is that the purchaser

at a tax sale cannot bring suit to recover the land purchased by him until the former owner, or some one else, takes adverse possession; and as no such possession may be taken until just before, or even after, the expiration of the five years, his right to the land is cut off without giving him his day in court, and the obligation of the contract contained in his deed, and the law under which it was executed, is impaired.

We do not think that the premise from which this conclusion is drawn is true in point of fact, nor, if it were, that the conclusion would follow.

The Iowa statute (Rev. 3601; Code, 3278) declares that "an action to determine and quiet the title of real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto though not in possession."

The Supreme Court of Iowa, in this case, held that the bringing of an action under the section first quoted would be an action for the recovery of the property, and would interrupt the running of the five years' Statute of Limitation. *Barrett* v. *Love*, 48 Iowa, 103.

The fact, therefore, that the lands are unoccupied during the five years succeeding the execution and recording of the tax deed is no obstacle to the bringing of a suit which would interrupt the running of the limitation.

But even if no such action could be brought, we think that the purchaser at a tax sale is not deprived of any of the rights conferred on him by his purchase and deed, by reason of the construction put upon the five years' Statute of Limitation.

The right of the legislature to prescribe what shall be the effect of a tax sale and deed cannot be questioned. The legislature of Iowa, in the enactments brought to our notice in this case, has exercised that right with great liberality to the purchaser at the tax sale. It has made his deed presumptive evidence of certain facts and conclusive evidence of others; it has declared that it shall vest in him all the estate of the former owner and of the county and State in the premises. But it has also declared, in effect, that the deed shall not support an action for the recovery of the land unless the suit

therefor is brought within five years after the treasurer's deed is executed and recorded. When, therefore, the purchaser at a tax sale receives the treasurer's deed, he takes it with all the advantages and disadvantages incident thereto. He knows precisely its effect, and what he must do to protect his title under it, for all this is plainly written in the law. If there should turn out to be an insuperable obstacle to his establishing his title to unoccupied lands, he cannot complain, for the whole subject was under the legislative control, the rules affecting his title were proclaimed in advance, and he bought with his eyes open. He took the risk of being able to make his deed effectual under the rules prescribed by the legislature. He gets all he bargained for. So that when the Statute of Limitation cuts him off, he having, as he imagined, been unable to bring his suit for want of a party in adverse possession, he has been deprived of no right which he ever possessed.

The legislature might have declared that the title of the purchaser at the tax sale should be divested without his consent by the repayment to him within a prescribed period, by the former owner, of the amount of his bid, or the tax and the interest and penalty thereon. The right to redeem the title of lands sold for taxes is one commonly reserved, and the right is favored by the policy of the law. *Dubois* v. *Hepburn*, 10 Pet. 1; *Corbett* v. *Nutt*, 10 Wall. 464; *Gault's Appeal*, 33 Pa. St. 94; *Rice* v. *Nelson*, 27 Iowa, 148; *Schenk* v. *Peay*, 1 Dill. 267; *Masterson* v. *Beasley*, 3 Ohio, 301; *Jones* v. *Collins*, 16 Wis. 594; *Curtis* v. *Whitney*, 13 Wall. 68. But it would scarcely be contended that such statute deprived the purchaser of his property without due process of law, or impaired the obligation of his contract of purchase.

But under the Iowa law the purchaser at a tax sale, who can find no one in possession against whom to bring his suit, has a plain way to make his title indefeasible, and that is by taking possession himself.

When the section prescribing the effect of the treasurer's deed and that prescribing the five years' limitation are considered together, the policy of the law is plain, and no cause of complaint is left the purchaser at tax sale. The effect of the two sections is this, that the party holding under the tax

deed must within five years either himself take actual possession of the property, or within the same period bring a suit to recover possession; and, upon his failure to do either, his action upon his deed shall be barred.

When thus considered, the law violates no contract and deprives the purchaser at the tax sale of no estate or property to which he had a right. He bought subject to a condition, with explicit warning that if he did not comply with it, his deed should become ineffectual to support an action. Failing to perform the condition, he is left without remedy, but also without just ground for complaint.

We see no error in the record.

Judgment affirmed.

WHITE v. NATIONAL BANK.

Suit by A. against B. as indorser of a protested draft, the indorsement being, "Pay to A. or order for account of B." The declaration contained a special count on the draft and indorsement, and one for money paid for the use of B. at his request. *Held*, 1. That by the terms of the indorsement A. became merely the agent of B. for the collection of the money. 2. That under the special count parol evidence was not admissible to vary those terms. 3. That under the common count it was competent for A. to show that at the time of the indorsement and delivery of the draft to him he gave B. his check therefor less the discount, and that the latter received and used the money. 4. That under that count A. was entitled to recover from B. either for money paid without consideration, money loaned, or money advanced to him on the faith of the delivery of the draft.

ERROR to the Circuit Court of the United States for the District of Colorado.

The facts are stated in the opinion of the court.

Mr. S. V. White for the plaintiff in error.

Mr. Henry M. Teller, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an action by White, who was plaintiff below, for the sum of $60,000, against the Miner's National Bank of

Georgetown, Colorado. The declaration contains twelve special counts, upon as many drafts, drawn by the Stewart Silver Reducing Company on Thomas W. Phelps, payable in the city of New York to the order of the defendant, and indorsed by J. L. Brownell, its president, to S. V. White, and duly protested for non-payment.

To these counts is added another, in this language: "And for that also, heretofore, to wit, on the first day of April, A.D. 1876, at the said county of Clear Creek, the said defendant was indebted to plaintiff in $60,000, for so much money by the plaintiff, before that time, paid to the use of said defendant at its request, which said sum of money was to be paid to the plaintiff on request," with an allegation of request and refusal.

To this declaration the defendant pleaded the general issue and several special pleas, which it is unnecessary to notice.

The case was tried by a jury. The plaintiff recovered $15,000 debt and $2,625 damages for interest, on account of three of the drafts. His claim on the other drafts, and for money paid at defendant's request, was rejected. He, therefore, brings this writ, and assigns for error the rulings of the court in the progress of the trial, which are set forth in a bill of exceptions.

J. L. Brownell, a partner in the firm of J. L. Brownell & Brother, doing business as bankers and brokers in the city of New York, was also president of the defendant, and interested in the Stewart Silver Reducing Company during the time of the transactions involved in this suit. As such president, he sold or transferred the several drafts on which this suit is founded to White, and received of the latter for the use of the bank the amount of said drafts less the discount. They were not paid at maturity, but due demand, protest, and notice were made. Those on which plaintiff recovered need not be further noticed. The others were rejected by the court as evidence against the defendant, on account of the form of the indorsement.

As they were, in this respect, alike, the form of one will be given here as a specimen of the whole: —

"$5,000.] OFFICE OF THE STEWART SILVER REDUCING COMPANY,
[L. S.] "GEORGETOWN, COL., Oct. 25, 1875.

"Four months after date pay to the order of the Miners' National Bank, Georgetown, Colorado, payable at the Third National Bank, New York City, five thousand dollars.

"STEWART SILVER REDUCING COMPANY,
"By J. OSCAR STEWART, *President.*

"To THOS. W. PHELPS, Esq.,
"Georgetown, Colorado.

Across the face, in red: "Accepted. — THOS. W. PHELPS.

Indorsed:

"No. . Pay S. V. White or order for account Miners' National Bank, Georgetown, Colorado. J. L. Brownell, p't.
"S. V. WHITE."

Because of the words "for account of Miners' National Bank of Georgetown, Colorado," in this indorsement by Brownell, as president of the bank, the Circuit Court ruled that there arose out of the transaction no obligation on the part of the bank to pay the draft or return the money, although due demand of the acceptor and refusal to pay was proved, with notice to the bank. This is the principal question which we are to decide.

The plaintiff relies largely on two propositions to establish his right to recover against defendant on this indorsement.

The first of these is that these words are merely directory and capable of explanation, and when it is shown by parol testimony, as in this case, that the plaintiff bought and paid full value for the draft, with the understanding that he was buying it as commercial paper, with the usual incidents of such a transaction, the indorser is liable in the usual manner, notwithstanding the words we have quoted.

The other proposition is that such is the custom of bankers who deal in such paper in New York, where these drafts are payable, and that the custom must control the construction of the contract.

We are not satisfied that either of these propositions is sound.

The language of the indorsement is without ambiguity, and needs no explanation, either by parol proof or by resort to

usage. The plain meaning of it is, that the acceptor of the draft is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser. It seems to us that the court below correctly construed the effect of the indorsement to be to make White the agent of the bank for the collection of the money.

If this be a sound view of the legal effect of the written indorsement, neither parol proof nor custom can be received to contradict it.

But we are aware of the necessity of proceeding with great caution in a case of first impression in regard to questions affecting commercial transactions, and we do not, therefore, decide this one, because we do not think it absolutely necessary to the case. For assuming this to be correct, we think the plaintiff was still entitled to recover more than he did.

The court below seems to have paid but little attention to the issue on the count for money paid to the use of defendant.

It appears distinctly by the evidence, and is uncontradicted, that the money paid by plaintiff on account of these drafts was placed to the credit of the defendant with its corresponding bankers in New York, and paid out on checks of the defendant, so that there is no question that the latter received the money. There is also no question but that plaintiff thought he was buying these drafts and that they became his property by their delivery to him. It is also evident that Brownell, the president of the bank, thought he was selling him the drafts, and there is evidence that neither White nor Brownell noticed the restrictive words of the indorsement. But if the court below was correct in holding that the indorsement — the evidence in writing of what the parties did — only made White the agent of the bank, and left the bank the owner of the drafts, then both White and Brownell were mistaken, and the money was paid and received under a mutual mistake. If White paid his money as purchase-money of the drafts, he paid it without any consideration, for he did not purchase the

drafts. He only burdened himself with the duty of collecting the money for the bank, and the bank received and used his money without giving him any consideration for it. So, also, if White did not become the owner of the drafts, and if, when he should collect the money on them, he would hold it, in the language of the indorsement, "for the account of the bank," the jury might have been left at liberty to presume that the money which he paid was a loan or advance on the security of the paper delivered to him at the time. Either of these views of the transaction would justify a recovery under the money count, in which the delivery of the money and the delivery of the drafts, with the qualified indorsement, would be evidence of the payment and receipt of the money and the circumstances which attended it.

This indorsement is treated by counsel here as an assignment of the paper without recourse, in which the title to the paper passed, but the right to recourse to the assignor was cut off. But this is evidently an error. If the court below was correct, neither the title to the paper nor the right to the money under it passed. The only effect was to justify the acceptor in paying to the indorsee for the account of the bank. The legal effect of the transaction, as evidenced by the writing, was merely to enable White to collect the money for the bank. Though a restricted indorsement, it was no assignment at all. It is not, therefore, a contradiction or a varying of the meaning of the written instrument to prove that, in the delivery of this paper to White, he and the bank were under a mistake as to the effect of it, or that he paid this money to the bank without any consideration, or that he advanced money to the bank in the idea that he was to be reimbursed out of the draft when collected.

The instructions given by the court, and the refusal of the prayer of plaintiff, fairly raised this question. All the drafts, except the three which had no such indorsement, were excluded from the jury. The jury were told that nothing else was before them.

The thirteenth instruction asked by plaintiff and refused by the court distinctly affirmed that if Brownell obtained from plaintiff sums of money on account of the drafts, which the

court had refused as evidence, which money was placed to the credit of defendant in a New York bank, and afterwards drawn by defendant, the defendant was liable for such money.

The judgment will be reversed, and the case remanded with directions to set aside the verdict and grant a new trial; and it is

So ordered.

NOTE. — *Third National Bank* v. *National Bank*, error to the Circuit Court of the United States for the District of Colorado, was argued by *Mr. William H. Scott* for the plaintiff in error, and by *Mr. Henry M. Teller* for the defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

The action in the present case is brought against the same defendant on indorsements of drafts precisely similar to the indorsements in *White* v. *National Bank*, though by a different plaintiff. There is in that case the same money count joined with special counts on the drafts, and the same evidence that the money came to the use of the defendant.

In this case, however, the parties waived a jury, and the court found no facts but rendered a general finding for the defendant. We have had some difficulty, therefore, in disturbing the judgment, as there is no charge to the jury, and no instructions asked and refused.

A bill of exceptions, however, embodies the evidence, and shows that the court refused to receive the drafts in evidence, although the accompanying evidence of the receipt of the money by defendant, and its payment by plaintiff, was the same as in the other case. To this ruling there was an exception.

We are of opinion that the drafts, the peculiar indorsement, and the payment of the money by the plaintiff, and its receipt and use by the defendant, were each and all parts of a transaction admissible as evidence of money paid by plaintiff to the use of defendant, to be repaid on request, and that the court erred in rejecting any part of it.

The judgment will therefore be reversed for that error, and the case remanded with directions to grant a new trial.

So ordered.

PAGE v. BURNSTINE.

1. Sect. 858 of the Revised Statutes of the United States, which declares "that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court," applies to the courts of the District of Columbia as fully as to the Circuit and District Courts of the United States.
2. A. assigned to the amount of a certain loan his interest in a policy of insurance upon his life to B., his creditor. The latter agreed in writing to make such a settlement with A.'s representatives as the case may require, should he, in the event of A.'s death before the payment of the money, receive from the insurance company the amount due on the policy. Other similar assignments were from time to time made. The last assignment imports an absolute transfer to B. of all A.'s right, title, and interest in the policy and to the payments previously made therefor, and all benefit and advantage to be derived therefrom. Upon consideration of the evidence, — *Held*, that the assignment must be construed as appointing B., upon the death of A., to receive from the company such sum as would then be due on the policy, and after reimbursing himself to the extent of his loans to A., to pay the balance to the persons entitled thereto.

APPEAL from the Supreme Court of the District of Columbia. The facts are stated in the opinion of the court.

Mr. William F. Mattingly, for the appellant.
Mr. Enoch Totten, contra.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is an appeal from a decree of the Supreme Court of the District of Columbia, dismissing a bill, filed by the personal representative of Robert C. Page, for the purpose of securing for the estate of the decedent the benefit of a policy upon his life for $3,000, issued Nov. 22, 1866, by the American Life Insurance Company of Philadelphia. The bill conceded that the defendant Burnstine had an interest in the policy to the extent of any loans of money by him to the assured, and prayed an account for the ascertainment of such sums. The defendant resisted the relief asked, upon the ground that, at the death of the assured, he was the absolute owner, by assignment, of the policy, and, as such, entitled to receive, to his own use, the

entire sum which might be realized thereon. The amount due on the policy, $2,676.33, was paid by the company into court, to abide the result of this suit.

Among the depositions taken in the case was that of Burnstine. He testified in reference to the alleged loans by him to Page and the several assignments which he claims were executed to him by the assured.

The preliminary question for our consideration is whether Burnstine, on his own motion, can testify as a witness in the cause. The contention of the appellant is, that no party to an action, by or against a personal representative, can testify against his adversary as to any transaction with, or statement by, the deceased, unless called to testify thereto by the opposite party, or required to testify thereto by the court. Rev. Stat., sect. 858. This rule, it is claimed, applies to the courts of the District of Columbia as fully as to the Circuit and District Courts of the United States. The contention of the appellee is, that his competency is to be determined by sects. 876 and 877 of the Revised Statutes relating to the District of Columbia. These positions require careful consideration; and it is essential to a clear understanding of the question, thus presented, to ascertain the history of the several provisions now incorporated as well in the Revised Statutes of the United States as in the Revised Statutes relating to the District of Columbia, upon the subject of the competency of witnesses in courts of justice.

To the third section of an act, approved July 2, 1864, making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1865, a proviso is annexed, "that in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions, because he is a party to, or interested in, the issue tried." 13 Stat. 351.

An act, approved on the same day, July 2, 1864, entitled "An Act relating to the law of evidence in the District of Columbia," provides, "that on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice in the District of Columbia, or before any person having by law, or by consent of parties, authority to hear, receive, and examine

evidence within said District, the parties thereto, and the persons in whose behalf any such action or other proceeding may be brought or defended, and any and all persons interested in the same, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said action or other proceeding: *Provided*, that nothing herein contained shall render any person who is charged with any offence in any criminal proceeding competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, or in any proceeding instituted in consequence of adultery; nor shall any husband be compellable to disclose any communication made to him by his wife during the marriage, nor shall any wife be compellable to disclose any communication made to her by her husband during the marriage." 13 Stat. 374.

On the 3d of March, 1865, Congress passed another act upon the subject of the competency of witnesses, entitled "An Act to amend the third section of an act, entitled 'An Act making appropriations for sundry civil expenses of the government for the year ending the thirtieth day of June, 1865, and for other purposes,' so far as the same relates to witnesses in the courts of the United States." The act declares that said third section of the appropriation act of July 2, 1864, "be, and the same hereby is, amended by adding thereto the following proviso: *Provided, further*, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court." Id. 533.

There is still another act which has an important bearing upon the question before us. We allude to that portion of

sect. 34 of the act of Feb. 21, 1871, creating a government for the District of Columbia, which declares that "the Constitution, and all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said District of Columbia as elsewhere within the United States." 16 id. 426. This provision was not affected by the subsequent displacement of the District government organized under that act.

Thus stood the law up to the date when the two revisions — one the Revised Statutes of the United States, and the other the Revised Statutes relating to the District of Columbia — went into operation.

If it be true, as argued, that the Supreme Court of the District of Columbia, although organized under and by authority of the United States, and possessing the same powers and jurisdiction as the circuit courts of the United States (12 Stat. 763; Rev. Stat. Dist. Col., sect. 760), was not intended to be embraced by the proviso to the third section of the appropriation act of July 2, 1864, and if, as may be further argued, the act of March 3, 1865, being, in terms, amendatory only of that section, was not intended to modify the special act of the latter date relating to this District, it is, nevertheless, quite clear that, from and after the passage of the act of Feb. 21, 1871, if not before, the act of March 3, 1865, became a part of the law of evidence in this District. The legal effect of the declaration that all the laws of the United States, not locally inapplicable, should have the same force and effect within this District as elsewhere within the United States, was to import into, or add to, the special act of July 2, 1864, relating to the law of evidence in the District, the exception, created by the act of March 3, 1865, to the general statutory rule, excluding parties as witnesses. This is manifestly so, unless it be that a statute affecting the competency of parties as witnesses in actions by or against personal representatives or guardians, in which judgment may be rendered for or against them, is "locally inapplicable" to this District. But such a position cannot be maintained consistently with sound reason. The same considerations of public policy which would require the enforcement of such a statute, as that of March 3, 1865, in

the Circuit and District Courts of the United States, without regard to the laws of the respective States on the same subject, would suggest its application in the administration of justice in the courts of this District. Congress no doubt felt that the general rule permitting parties to testify on their own motion put the representatives of deceased persons at a great disadvantage, if those proceedings against them by suit could, on their own motion, testify as to transactions with, or statements by, the decedent. To remedy that evil, the act of March 3, 1865, was passed, and it should not be held locally inapplicable to this District, simply because it enlarges the exceptions to the general rule established by the special act of July 2, 1864.

These views do not at all conflict with the previous decisions of this court, holding that certain provisions of the General Statutes of the United States relating to the practice and proceedings in the "courts of the United States" are locally inapplicable to territorial courts. Those decisions, it will be seen, proceeded upon the ground, mainly, that the legislatures of the Territories referred to, in the exercise of power expressly conferred by Congress, had enacted laws covering the same subjects as those to which the General Statutes of the United States referred. It was, therefore, ruled that the territorial enactments, regulating the practice and proceedings of territorial courts, were not displaced or superseded by general statutes upon the same subject passed by Congress in reference to "courts of the United States." *Clinton* v. *Englebrecht*, 13 Wall. 434; *Hornbuckle* v. *Toombs*, 18 id. 648; *Good* v. *Martin*, 95 U. S. 90. No such state of case exists here. The reasons assigned for the conclusion reached in those cases have no application to the question before us.

Such being the law when the Revised Statutes of the United States and the Revised Statutes relating to the District of Columbia went into operation (which was on the same day) we are to inquire whether Congress by those revisions made, or intended to make, any change in the particular rule of evidence now under examination. We are of opinion that no alteration of the previous law was made or intended. The special act of July 2, 1864, relating to the law of evidence in this District, is reproduced, *ipsissimis verbis*, in two

paragraphs, constituting sects. 876 and 877 of the District revision; the act of July 16, 1862 (12 Stat. 588, 589), the third section of the appropriation act of July 2, 1864, and the act of March 3, 1865, are consolidated into one paragraph, and, without the slightest material change of language, constitute sect. 858 of the Revised Statutes of the United States; and the provision already quoted from the act of Feb. 21, 1871, is reproduced in sect. 93 of the District revision. If we consulted alone sects. 876 and 877 of the Revised Statutes relating to the District, we should, perhaps, be constrained to hold that, in the courts of the District, *parties* could, upon their own motion, testify as well in actions by or against personal representatives as in any other action. But we cannot overlook the fact that, in the revisions, the language of the previous statutes have undergone no change whatever. We should not, therefore, permit the mere collocation or rearrangement of the previous statutes in the new revisions, adopted on the same day, to operate to change the law, and thereby defeat the will of Congress. Rev. Stat. Dist. Col., sect. 1296; Rev. Stat., sect. 5600.

For these reasons, we are of opinion that Burnstine could not, on his own motion, testify as to any transaction with, or statement by, the decedent, Page. His deposition as to such transactions and statements must be excluded from consideration.

Upon the merits of the case we waive any consideration of the question suggested in oral argument, as to whether Burnstine, consistently with public policy, could acquire by assignment any interest in the insurance upon the life of Page, beyond such amount as the latter actually owed him at the time of his death. No such question is raised in the pleadings, nor was it suggested or considered in the court below. We pass it by for the additional reason that its determination is unnecessary in the view which the court takes of this case.

The transactions between Page and Burnstine had their origin, it is conceded, in a loan of money by the latter to the former. To secure that loan an assignment was made of Page's interest in the policy to the extent of the sum borrowed. Each subsequent assignment shows, upon its face, a similar arrangement, until that of Jan. 7, 1873, was executed. The latter assignment, by itself, imports an absolute transfer to

Burnstine of all the right, title, and interest of the assured in the policy, and to the payments made therefor, and all benefit and advantage to be derived therefrom. But the circumstances disclosed in the record indicate, with reasonable certainty, that the real and only object of the execution of the assignment of Jan. 7, 1873, was to invest Burnstine with the entire control of the policy, to the end that, thereafter, the company might deal directly with him, and, upon the death of the assured, that he might be invested with full authority to receive the proceeds of the policy, and apply them in the repayment of such sum or sums as he had loaned to Page upon the security of the policy. In other words, the last assignment may be construed as simply appointing Burnstine, upon the death of the assured, to receive from the company such sum as would then be due on the policy, and, after reimbursing himself to the extent of his loans to Page, to pay the balance to the persons entitled thereto. A different construction of that instrument would place Burnstine in the position of being pecuniarily interested in the death of Page. Unless compelled to do so, we should not suppose that he had any desire or purpose to speculate upon the life of Page, or to do more than secure the repayment of the money actually loaned by him to the assured.

This construction of the assignment of Jan. 7, 1873, is fortified by other evidence. Cross, the local agent at Washington of the insurance company, drew the assignment. In his deposition, taken by the defendant, he testifies that Page admitted, about December, 1871, his inability to keep up the premiums. Burnstine was advised of these facts. Cross thereupon recommended to him that, in order to save himself, he should secure an absolute assignment of the policy. Nothing was said by the parties, upon the occasion when the assignment was drawn, as to its consideration. If the intention had been, upon the part of Page, to make an unconditional sale, and upon the part of Burnstine, to make an unconditional purchase, of the policy, something would have been then said indicating such an intention. That portion of the evidence, which we are at liberty to consider, tends to show that Burnstine acted upon the advice of Cross, and took an absolute assignment, with the object of saving himself, — a result which

can be accomplished by awarding to him, out of the proceeds of the policy, such sum as will reimburse him for the loans made to Page.

This conclusion is strengthened by the language employed by Burnstine in his receipt of Oct. 2, 1868. In that paper, he acknowledges the receipt from Page of six orders, for $50 each, upon the disbursing clerk in the Post Office Department, and agrees that in the event Page dies before the orders are paid, and he, Burnstine, should receive from the insurance company the whole or a part of the amount due on the policy, he "would make such a settlement with his [Page's] representatives as the case may require."

This obligation of Burnstine was not, in terms, withdrawn or cancelled in any of the assignments thereafter executed, and the receipt of Oct. 2, 1868, should not, therefore, be overlooked in ascertaining the real purpose the parties had in the assignment of Jan. 7, 1873. Our conclusion is still further strengthened by the language in one of the conditions inserted in the policy (of which, it must be assumed, the parties were aware), to the effect that, "in case of the assignments of a policy, whether as security or otherwise, satisfactory proofs of the assignee's interest in the insured life must be furnished with the proofs of death." If the company, or Burnstine, understood that the latter, by the assignment of Jan. 7, 1873, became entitled to the whole sum due on the policy at the death of the assured, without reference to the amount Burnstine had actually paid out, it would have been an idle ceremony for the latter to have furnished proofs of his interest in the assured life.

The decree must be reversed, and the cause remanded with directions that an account be taken, as well of the sums actually loaned or paid by Burnstine to Page upon the policy as security for its repayment, as of all sums paid by him for the purpose of keeping the policy in force, and for such decree as may be in conformity to this opinion; and it is

So ordered.

MR. JUSTICE BRADLEY. I dissent from so much of the opinion in this case as holds that the act of Congress relating

to the admission of parties to testify in the courts of the United States applies to the courts of the District of Columbia. The act relating to that subject in reference to judicial proceedings in the District covers the whole subject, and excludes the operation of any general law unless the latter is made specially applicable. The practice of admitting colored persons to testify prevailed in the District courts from the organization of the present Supreme Court of the District, and did not need the aid of the general statute. The admission of parties to testify in the courts of the District was provided for in a distinct and separate statute relating to the District alone.

I concur in the judgment of the court notwithstanding the evidence of the defendant.

HARTMAN v. GREENHOW.

1. The judgment in a proceeding for a *mandamus* is subject to review on the same conditions as that in any other action.
2. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, may, in the class of cases provided for in sect. 709, Rev. Stat, be re-examined here upon writ of error, although it was rendered upon an equal division of opinion among the judges. It is immaterial whether that court, in rendering it, was exercising original or appellate jurisdiction.
3. In the adjustment of her debt by the State of Virginia, her bonds, payable to order or bearer, with coupons annexed to them payable to bearer, were issued under the act of March 30, 1871, known as the "Funding Act," which declares that the coupons "shall be receivable at and after maturity for all taxes, debts, dues, and demands due the State," and that this shall be expressed on their face. Where, therefore, a creditor took, as in that act provided, such bonds for two-thirds of the amount of the old bonds he surrendered, and a certificate for the balance, a contract was consummated between the State and the holder of the bonds and the holder of the coupons, from which, without their consent, she could not be released.
4. A subsequent enactment requiring the tax on the bonds issued under that act to be deducted from the coupons originally attached to them, when tendered in payment of taxes or other dues to the State, cannot be applied to coupons separated from the bonds, and held by a different owner, without impairing the contract. Such an owner is therefore entitled to a *mandamus* to compel the proper officer to receive for their full amount the coupons so tendered.

ERROR to the Supreme Court of Appeals of the State of Virginia.

The case is fully stated in the opinion of the court.

William L. Royall for the plaintiff in error.

Mr. James G. Field, Attorney-General of Virginia, *contra.*

MR. JUSTICE FIELD delivered the opinion of the court.

The plaintiff in error, who is the petitioner in the court below, is a citizen and resident of the city of Richmond, State of Virginia; and on the 5th of April, 1878, was indebted to the State for taxes to the amount of twenty-six dollars and fifty-three cents. On that day he tendered to the treasurer of Richmond — who is by law charged with the duty of collecting the taxes of the State in that city — certain interest coupons, which were overdue, amounting to twenty-four dollars, cut from bonds of the State, issued under the provisions of an act of the General Assembly, passed March 30, 1871, commonly known as the Funding Act, and two dollars and fifty-three cents in lawful money of the United States, in payment of the taxes; but the treasurer refused to receive the coupons in discharge of the taxes without first deducting therefrom the taxes upon the bonds to which they were originally attached. The petitioner holding the coupons was not at the time the owner of such bonds. Upon this refusal he applied to the Supreme Court of Appeals of Virginia for a writ of *mandamus* to the treasurer to compel him to receive the coupons, with the money mentioned, in full discharge of the petitioner's taxes, without any deduction from the coupons for the taxes upon the bonds.

The court issued a rule or an alternative writ upon the treasurer, to which he answered, that the General Assembly of the State had, for many years, exercised the right to tax all bonds, choses in action, and other evidences of debt, including bonds of the State; that the taxes assessed upon the latter bonds were according to their market value, the amount being fixed at fifty cents on the one hundred dollars of such value; that the law required the taxes to be collected when the interest on the bonds was paid, and made it a high penal offence for any officer to receive coupons in payment of taxes without deducting

from their face value the tax levied upon the bonds from which they were taken; and he referred to several acts of the legislature in support of this statement. He also answered, that at the time the coupons were tendered to him he proposed to deduct from them the amount of the taxes on the bonds to which they were originally attached, and demanded of the petitioner a like amount in money in addition to what was tendered; that he would not otherwise have been justified in giving a receipt in full for the taxes due; and that this additional amount the petitioner refused to pay. The respondent, therefore, denied that the petitioner was entitled to the writ, and prayed that his petition be dismissed.

The application was fully argued before the Supreme Court of Appeals by counsel for the petitioner, and by the attorney-general of the State for the treasurer. The judges of the court were equally divided in opinion upon it, and, as is usual in such cases, the application was denied, and judgment to that effect, with costs, was entered. To review this judgment the case is brought here on writ of error.

The principal question for determination, as thus seen, is the validity of the statute of the State requiring the tax levied upon its bonds to be deducted from the coupons for interest, originally attached to them, when the coupons are presented for payment, so far as it applies to coupons separated from the bonds and held by different owners.

To fully understand this question, it will be necessary to make a brief reference to the legislation of the State upon her indebtedness. But before doing this there is a question of jurisdiction to be considered. The judgment of the Supreme Court of Appeals being entered upon an equal division of opinion among its judges, it is argued that there is no such final adjudication of the State court as can be reviewed by this court.

The Revised Statutes, which express the statute law of the United States in force Dec. 1, 1873, provide, in sect. 709, — embodying substantially the provisions of the twenty-fifth section of the Judiciary Act of 1789, — that a final judgment or decree, in any suit, of the highest court of a State in which a decision could be had, may be re-examined by the Supreme Court of

the United States in three classes of cases. In all of them there must be a final judgment or decree of the highest court of the State, and the decision expressed by that judgment must have involved a question under the Constitution, laws, or treaties of the United States, and have been adverse to some right, privilege, or immunity claimed under them. Here the Supreme Court of Appeals certifies that on the hearing of the case there was drawn in question the validity of the statute of the State authorizing the tax upon the bonds and requiring its deduction from the coupons, on the ground of its repugnancy to the provision of the Constitution of the United States, prohibiting any legislation by the States impairing the obligation of contracts; and that the decision was in favor of the validity of the State statute and against the right claimed by the petitioner under the provision of the Constitution of the United States. That this certificate correctly states the question involved will more clearly appear from the legislation of the State, which we shall presently consider. The judgment denying the writ of *mandamus* was a final determination against the claim of the petitioner to have the coupons held by him received for taxes without a deduction from their face value of the amount of the tax levied on the bonds. A *mandamus* in cases of this kind is no longer regarded in this country as a mere prerogative writ. It is nothing more than an ordinary proceeding or action in which the performance of a specific duty, by which the rights of the petitioner are affected, is sought to be enforced. Says Mr. Chief Justice Taney: "It undoubtedly came into use by virtue of prerogative power in the English crown, and was subject to regulations and rules which have long since been disused; but the right to the writ and the power to issue it have ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable. It was so held by this court in the cases of *Kendall* v. *The United States*, 12 Pet. 615, and *Kendall* v. *Stokes et al.*, 3 How. 100." *Kentucky* v. *Dennison*, 24 How. 66, 97. And such we understand to be the law of Virginia. The judgment, therefore, in the case, stands like the judgment in an ordinary action at law, subject to review under similar conditions. It is not the less expressive of the decision of the

court upon the merits of the petitioner's claim in the case because it is rendered upon an equal division of opinion among the judges. The fact of division does not impair the conclusive force of the judgment, though it may prevent the decision from being authority in other cases upon the question involved. The judgment is that of the entire court, and is as binding in every respect as if rendered upon the concurrence of all the judges. *Lessieur* v. *Price*, 12 How. 59; *Durant* v. *Essex County*, 7 Wall. 107; s. c. 101 U. S. 555.

Nor does it matter that the judgment was rendered in an original proceeding in the Supreme Court of Appeals of Virginia, and not in a case pending before that court on appeal. It is enough for our jurisdiction that the judgment is by the highest tribunal of the State in which a decision could be had in the suit. When such a judgment is brought before us for review, involving in its rendition a decision upon a Federal question, we do not look beyond the action of that court. It is enough that we have its final judgment in the case, whether it be one of original jurisdiction or heard by it in the exercise of its own appellate power over the inferior courts of the State.

We proceed, therefore, to consider the legislation of the State upon her indebtedness. A brief sketch of it will perhaps enable us better than in any other way to exhibit the question for our determination, and indicate the solution it should receive.

It appears from the statutes to which we are referred — and we know the fact as a matter of public history — that prior to the late civil war Virginia had become largely indebted for moneys borrowed to construct public works in the State. The moneys were obtained upon her bonds, which were issued to an amount exceeding $30,000,000. Being the obligations of a State of large wealth, which never allowed its fidelity to its promises to be questioned anywhere, the bonds found a ready sale in the markets of the country. Until the civil war, the interest on them was regularly and promptly paid. Afterwards the payments ceased, and until 1871, with the exception of a few small sums remitted in coin during the war to London for foreign bondholders, or paid in Virginia in Confederate money, and a small amount paid in 1866 and 1867, no part of the in-

terest or principal was paid. During the war a portion of her territory was separated from her, and by its people a new State, named West Virginia, was formed, and by the Congress of the United States was admitted into the Union. Nearly one-third of her territory and people were thus taken from her jurisdiction. But as the whole State had created the indebtedness for which the bonds were issued, and participated in the benefits obtained by the moneys raised, it was but just that a portion of the indebtedness should be assumed by that part which was taken from her and made a new State. Writers on public law speak of the principle as well established, that where a State is divided into two or more States, in the adjustment of liabilities between each other, the debts of the parent State should be ratably apportioned among them. On this subject Kent says: "If a State should be divided in respect to territory, its rights and obligations are not impaired; and if they have not been apportioned by special agreement, their rights are to be enjoyed and their obligations fulfilled by all the parts in common." 1 Com. 26. And Halleck, speaking of a State divided into two or more distinct and independent sovereignties, says: "In that case, the obligations which have accrued to the whole before the division are, unless they have been the subject of a special agreement, ratably binding upon the different parts. This principle is established by the concurrent opinions of text-writers, the decisions of courts, and the practice of nations." International Law, c. 3, sect. 27.

In conformity with the doctrine thus stated by Halleck, both States — Virginia and West Virginia — have recognized in their Constitutions their respective liability for an equitable proportion of the old debt of the State, and have provided that measures should be taken for its settlement. The Constitution of Virginia of 1870 declared that the General Assembly should "provide by law for adjusting with the State of West Virginia the proportion of the public debt of Virginia proper to be borne by the States of Virginia and West Virginia," and should "provide that such sums as shall be received from West Virginia shall be applied to the payment of the public debt of the State." Art. 10, sect. 19.

The Constitution of West Virginia, which went into effect

in 1863, declared that "an equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861," should "be assumed" by the State, and that the legislature should "ascertain the same as soon as practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years." Art. 8. sect. 8.

But notwithstanding these constitutional requirements and various efforts made to adjust the liabilities of West Virginia, nothing was accomplished up to March 30, 1871, and it is stated by counsel that nothing has been accomplished since. As might have been expected, the position of Virginia was not a pleasant one, being charged with the whole indebtedness which accrued before the formation out of her territory of a new State, and entitled to, without being able to obtain, a contribution from the new State of a part of it, corresponding proportionately to her extent and population. She, therefore, undertook to effect a separate adjustment with her creditors, and for that purpose, on the 30th of March, 1871, passed an act known as the "Funding Act" of the State. It is entitled "An Act to provide for the funding and payment of the public debt." Its preamble recited that in the ordinance authorizing the organization of the State of West Virginia it was provided that she should take upon herself a just proportion of the public debt of the Commonwealth of Virginia, prior to Jan. 1, 1861, and that this provision had not been fulfilled, although repeated and earnest efforts in that behalf had been made by Virginia; and then declared that, "to enable the State of West Virginia to settle her proportion of said debt with the holders thereof," and to prevent any complications or difficulties which might be interposed to any other manner of settlement, and "for the purpose of promptly restoring the credit of Virginia, by providing for the certain and prompt payment of the interest on her proportion of said debt, as the same shall become due," the legislature enacted that the owners of the bonds, stocks, or interest certificates of the State (with a few exceptions) might fund two-thirds of the same and two-thirds of the interest due or to become due thereon up to July 1, 1871, in six per cent coupon or registered bonds of the State,

to run thirty-four years, — the bonds to be made payable to order or bearer, and the coupons to bearer. The act declared that the coupons should be payable semi-annually, and "be receivable at and after maturity for all taxes, debts, dues, and demands due the State," and that this should be so expressed on their face. For the remaining one-third of the amount of the bonds thus funded the act provided that certificates should be issued to the creditors, setting forth the amount of the bonds not funded, with the interest thereon, and that their payment would be provided for in accordance with such settlement as might be subsequently had between the two States; and that Virginia would hold the bonds surrendered, so far as they were not funded, in trust for the holder or his assignees. The bonds of the State, with the accumulated interest, then amounted to over forty millions of dollars.

Under this act a large number of the creditors of the State, holding bonds amounting, including interest thereon, to about thirty millions of dollars, surrendered them and took new bonds with interest coupons annexed for two-thirds of their amount and certificates for the balance. A contract was thus consummated between the State and the holders of the new bonds, and the holders of the coupons, from the obligation of which she could not, without their consent, release herself by any subsequent legislation. She thus bound herself, not only to pay the bonds when they became due, but to receive the interest coupons from the bearer at and after their maturity, to their full amount, for any taxes or dues by him to the State. This receivability of the coupons for such taxes and dues was written on their face, and accompanied them into whatever hands they passed. It constituted their chief value, and was the main consideration offered to the holders of the old bonds to surrender them and accept new bonds for two-thirds of their amount.

In *Woodruff* v. *Trapnall*, reported in 10th Howard, a provision in an act of Arkansas, similar to this one, that the bills and notes of the Bank of the State of Arkansas, the capital of which belonged to the State, should "be received in all payments of debts due to the State of Arkansas," was held to be a contract with the holders of such notes which was binding on

the State, and that the subsequent repeal of the provision did not affect the notes previously issued. "The notes," said the court, "are made payable to bearer; consequently every *bona fide* holder has a right, under the twenty-eighth section" (the one making the notes receivable for dues to the State), "to pay the State any debt he may owe it in the paper of the bank. It is a continuing guaranty by the State that the notes shall be so received. Such a contract would be binding on an individual, and is not the less so on the State." "And that the legislature could not withdraw this obligation from the notes in circulation at the time the guaranty was repealed, is a position which can require no argument." In *Furman* v. *Nichol*, reported in the 8th Wallace, a similar provision in an act of Tennessee, declaring that certain notes of the bank of that State should be "receivable" at the treasury of the State and by tax-collectors and other public officers, "in all payments for taxes and other moneys due the State," was held by this court unanimously to constitute a valid contract between the State and every person receiving a note of the bank. An attempt was made in the case to restrain the operation of the guaranty contained in the provision to the person who received the note in the course of his dealing with the bank, but the court said: "The guaranty is in no sense a personal one. It attaches to the note, — is part of it, as much so as if written on the back of it; goes with the note everywhere, and invites every one who has taxes to pay to take it."

Yet notwithstanding the language of the act of March 30, 1871, providing that the interest coupons of the new bonds should "be receivable at and after maturity for all taxes, debts, dues, and demands due the State," and this was so expressed upon their face, the legislature of Virginia, less than one year afterwards (on the 7th of March, 1872), passed an act declaring that thereafter it should "not be lawful for the officers charged with the collection of taxes or other demands of the State" then due or which should thereafter become due "to receive in payment thereof anything else than gold or silver coin, United States Treasury notes, or notes of the national banks of the United States." This act, as seen on its face, is in direct conflict with the pledge of the State of the previous

year, and with the decisions of this court to which we have referred. Its validity, as might have been expected, was soon attacked in the courts as impairing the obligation of the contract contained in the Funding Act, and came before the Supreme Court of Appeals of the State for consideration in *Antoni* v. *Wright*, at its November Term of 1872. The subject was there most elaborately and learnedly treated. The cases above were cited by the court; and the provision of the Funding Act was shown, by reasoning perfectly conclusive, to be a contract founded upon valuable considerations and binding upon the State. It was earnestly pressed upon the court that it was not within the legitimate power of the legislature to make such a contract; that it would tend to embarrass the action of subsequent legislatures by depriving them of the proper control of the annual revenue, and might, by absorbing the revenue, substantially annul the taxing power and put a stop to the wheels of government. But the court said, among other answers to this, that no rightful power of the State was surrendered by the legislation, but simply a provision made for the payment of the debts of the State; that the annual accruing interest on the debt of the State was in all well-regulated governments deemed an essential part of their annual expenses, and was always annually provided for. The act only made provision for an annual appropriation of a portion of the revenue, derived from taxation, to the payment of existing debts; and such legislation could not be deemed a great stretch of power, when the organic law of the State not only contemplated the punctual annual payment of the interest of her entire debt, but imperatively required, on the creation of a debt, that a sinking fund should be at once established, to be applied solely to its extinction. The organic law thus not merely authorized, but required the legislature which created the debt to bind all future legislatures, by the establishment of a fund to be applied solely to the extinction of the debt. And as to the objection that such legislation might, and probably would, result in crippling the power and resources of the State in time of war or other great calamity, the court said, that legislation cannot well be adapted in advance to extraordinary and exceptional cases; that such cases will occur at all times with all nations,

and must be provided for by the wisdom and prudence of the government for the time being. "At such a time, however," said the court, in words full of wisdom, "the honored name and high credit secured to a State by unbroken faith, even in adversity, will, apart from all other considerations, be worth more to her in dollars — incalculably more — than the comparatively insignificant amount of the interest on a portion of the public debt enjoyed by breach of contract." The court thus expressed a great truth, which all just men appreciate, that there is no wealth or power equal to that which ultimately comes to a State when in all her engagements she keeps her faith unbroken.

These decisions of the Federal and State courts dispose substantially of the question presented in the case at bar. The act of March, 1872, being held to be invalid, the coupons were subsequently, and until March, 1873, received for all taxes due the State to their full amount. On the 25th of that month, the legislature passed an act providing that from the interest payable out of the treasury on bonds of the State, whether funded or unfunded, there should be retained a tax equal in amount to fifty cents on the one hundred dollars of their market value, on the first day in April of each year, and made it the duty of every officer of the Commonwealth, charged with the collection of taxes, to deduct from the matured coupons which might be tendered to him in payment of taxes, or other dues to the State, such tax as was then or might thereafter be imposed on the bonds. The act, in terms, applied to all bonds of the State, whether held by her own citizens or non-residents and citizens of other States or countries. In 1874, the legislature modified this provision so that the tax on the bonds should not be retained from the interest paid on them, when they were the property of non-residents of the Commonwealth. But this exemption was omitted in the act of 1876, providing for the assessment of taxes in the State, in which the provision of the act of 1873 was inserted. It is the validity of this provision requiring the tax levied on the bonds to be deducted from the coupons held by other parties, when tendered in payment of their taxes or other dues to the State, which is presented for our determination.

The power of the State to impose a tax upon her own obligations is a subject upon which there has been a difference of opinion among jurists and statesmen. On the one hand, it has been contended that such a tax is in conflict with and contrary to the obligation assumed; that the obligation to pay a certain sum is inconsistent with a right, at the same time, to retain a portion of it in the shape of a tax, and that to impose such a tax is, therefore, to violate a promise of the government. See Hamilton on the Public Credit, in his works, 3d vol., pp. 514–518.

On the other hand, it is urged that the bonds of every State are property in the hands of its creditors, and, as such, that they should bear a due proportion of the public burdens. In the case of *Murray* v. *Charleston* (96 U. S. 432) there are many pertinent and just observations on this subject which it is not material to repeat, for the question is not necessarily involved in the disposition of the case before us. Whatever may be the wise rule — looking at the necessity in a commercial country for its prosperity that its public credit should never be impaired — as to the taxability of the public securities, it is settled that any tax levied upon them cannot be withheld from the interest payable thereon. Such was the decision of this court in *Murray* v. *Charleston*. There the city had issued certificates of stock, whereby it promised to pay to the owners thereof certain sums of money, with six per cent interest, payable quarterly. Subsequently it imposed a tax of two per cent on the value of all property within its limits for the purpose of meeting the expenses of its government; and, treating its stock as part of such property, directed that the tax assessed upon it should be retained by the treasurer of the city from the interest due thereon. To recover the amount thus retained, which was one-third of the interest stipulated, suit was brought. The city defended its action on the ground that the tax on the stock was not higher than the tax on all other property of its citizens, and that all property in the city was subject to taxation; but the court answered that, by the legislation of the city, its obligation to its creditors was impaired, and, however great its power of taxation, it must be exercised, being a political agency of the State, in subordination to the inhibition of

the Federal Constitution against legislation impairing the obligation of contracts. Until the interest was paid, no act of the State or of its political subdivisions, exercising legislative power by its authority, could work an exoneration from what was promised to the creditor. This decision would be decisive here, but the present case is still stronger for the creditor. The Funding Act made the bonds issued under it payable to order or bearer, and made the coupons payable to bearer. They were, so far, distinct and independent contracts, that they could be separated from each other and transferred to different hands.

In *Clark* v. *Iowa City* we had occasion to speak of bonds of municipal bodies and private corporations having similar coupons, and the language there used is applicable here. We said that most of such bonds "are issued in order to raise funds for works of large extent and cost, and their payment is, therefore, made at distant periods, not unfrequently beyond a quarter of a century. Coupons for different instalments of interest are usually attached to such bonds in the expectation that they will be paid as they mature, however distant the period fixed for the payment of the principal. These coupons, when severed from the bonds, are negotiable and pass by delivery. They then cease to be incidents of the bonds, and become in fact independent claims; they do not lose their validity if for any cause the bonds are cancelled or paid before maturity, nor their negotiable character, nor their ability to support separate actions. . . . They then possess the essential attributes of commercial paper, as has been held by this court in repeated instances. 20 Wall. 583, 589.

Here, also, the coupons held by the petitioner were distinct contracts imposing separate obligations upon the State. He was not the owner of the bonds to which they had been originally attached. In his hands they were as free and discharged from all liability on those bonds as though they had never been connected with them. And surely it is not necessary to argue that an act which requires the holder of one contract to pay the taxes levied upon another contract held by a stranger cannot be sustained. Such an act is not a legitimate exercise of the taxing power: it undertakes to impose upon one the burden which should fall, if at all, upon another.

The Funding Act stipulated that the coupons should be receivable for all taxes and dues to the State, that is, for taxes and dues owing by the holders of the coupons, and for their full amount; and upon this pledge the holders of the bonds of the State surrendered them, and took new bonds for two-thirds of their amount. The act of 1876 declares that the coupons shall not be thus received for taxes and dues owing by the holders of them for their full amount, but only for such portion as may remain after a tax subsequently levied upon the bonds, to which they were originally attached, is deducted, though the bonds be held by other parties. If this act does not impair the contract with the bondholder, — who was authorized to transfer to others the coupons with this quality of receivability for taxes annexed, — and also the contract with the bearer of the coupon written on its face that it should be received for all taxes to the State, it is difficult to see in what way the contract with either would be impaired, even though the tax on the bond should equal the whole face of its coupons. If, against the express terms of the contract, the State can take a portion of the interest in the shape of a tax on the bond, it may at its pleasure take the whole.

We are clear that this act of Virginia of 1876 (sect. 117), requiring the tax on her bonds, issued under the Funding Act of March 30, 1871, to be deducted from the coupons originally attached to them when tendered in payment of taxes or other dues to the State, cannot be applied to coupons separated from the bonds, and held by different owners, without impairing the contract with such bondholders contained in the Funding Act, and the contract with the bearer of the coupons. It follows that the petitioner was entitled to a writ of *mandamus* to compel the treasurer of the city of Richmond to receive the coupons, tendered to him in payment of taxes due the State, for their full amount.

The judgment of the Supreme Court of Appeals denying the writ must, therefore, be reversed, and the case remanded for further proceedings in accordance with this opinion; and it is

So ordered.

MR. JUSTICE MILLER dissenting. I dissent from the judgment of the court. In addition to the general proposition which I have always maintained, that no legislature of a State has authority to bargain away the State's right of taxation, I am of opinion that in issuing the bonds and coupons which are the subject of this controversy the legislature of Virginia, neither in terms nor by any just inference, made any contract that the bonds and coupons should not be subject to the same taxes as other property taxed by the State.

SHARPE v. DOYLE.

1. Where the marshal of the United States, to whom was directed a warrant of provisional seizure sued out of the proper court sitting in bankruptcy, levied it upon certain goods in the possession of a third party claiming title to them, — *Held*, that this court has jurisdiction to re-examine the judgment of a State court, whereby it was held in a suit against the marshal that, by reason of such possession, he had no authority under the laws of the United States to so levy the warrant.
2. The goods were subject to seizure under the warrant, if they were the property of the person against whom the proceeding in bankruptcy was pending.
3. The marshal must, in such a case, act at his own risk, in regard to the ownership of them and their liability to seizure.

ERROR to the Superior Court of the city of New York.

The case is stated in the opinion of the court.

Mr. Charles E. Whitehead for the plaintiff in error.

Mr. William Henry Arnoux, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

Alfred E. Lagrave and James D. Otis, partners in trade, were, on a petition filed May 30, 1872, adjudicated bankrupts on the eighth day of the following June. On the first day of the latter month a warrant was issued under the seal of the District Court, in which the bankruptcy proceedings were pending, directed to the marshal of the district, which, after

reciting that a previous order had been obtained for the possession of the bankrupts' goods, proceeded as follows: —

"You are therefore required and authorized, immediately upon receipt hereof, to take possession provisionally of all the property and effects of said Alfred E. Lagrave and James D. Otis, and safely keep the same until the further order of the court."

Under this warrant the plaintiff in error, who was the marshal to whom the writ was directed, seized eight packages of goods. For this act he was sued in the Superior Court of the city of New York by the defendants in error, who recovered a judgment against him for their value, which was finally affirmed by the Court of Appeals.

The case was tried by a jury, the defendant's plea being that the goods were the property of the bankrupts, and were lawfully seized under the warrant for provisional possession.

While it is uncontradicted that the goods had been the property of the bankrupts, evidence was given tending to show that, in fraud of the bankrupt law, they had been purchased a few days before by the plaintiffs in this action, and that, when seized by the marshal, they were in the possession of the plaintiffs, or of some one for them. The court gave the jury the following instruction: —

"As you know, the defendant is a United States marshal. He has certain powers given to him by statute. Under a warrant of the kind in evidence (the form of which it is unnecessary to read to you) he has authority to take goods belonging to a bankrupt and which are in his possession. He has no authority under such a warrant to take goods from a third person, having possession for himself of the goods and claiming as a matter of right to be entitled to their possession. If that be the case here, the defendant had no right to take these goods from Mr. Ketchum's warehouse. If Mr. Doyle was, as a matter of fact, in possession of these goods, claiming them as owner for himself, then the plaintiffs, Doyle and Adolphi, are entitled to recover for the value of the goods what you shall find it to be. Otherwise, the defendant is entitled to a verdict. It will be unnecessary for you to inquire as to the reasons of

this; but I say to you, briefly, that such a rule of law as that does not finally determine the rights of the parties, because the defendant may only have limited rights to take possession under certain circumstances, while the assignee in bankruptcy for the creditors of Lagrave & Co. might try the question on different principles of law. This defendant is an officer of the law, with certain limited powers."

This charge, to which an exception was taken, was decisive of the case, there being no doubt that persons other than the bankrupts had, under claim of title, the possession of the goods at the time they were seized under the warrant. The defendant asserted a right to them, under the laws of the United States, on the ground that the pretended purchase by the plaintiffs was a fraud upon the bankrupt law, and passed no title; that the ownership was, by virtue of the bankruptcy proceedings, in the assignee; and that the plaintiffs were not entitled to recover. The right so claimed was decided adversely to the defendant. The instruction was affirmed in the court of last resort, and its soundness depends upon the authority conferred on him by the writ. The case is, therefore, a proper one for a writ of error from this court.

The writ in the marshal's hand is identical in its mandatory part with sect. 5024 of the Revised Statutes, and, if he did no more than it commanded him, was a sufficient justification for his act, unless the statute is unconstitutional. This is not pretended, either here or in the State courts.

It is a little difficult to see upon what principle the plaintiffs can maintain the suit, if they were not the rightful owners of the goods. It is true that, in a case of naked trespass without claim of right in the trespasser, the possessor of the goods may recover, without regard to the state of the title. But such is not the case here. The defendant acted under a lawful writ from a court having jurisdiction to issue it. By his plea he took upon himself the burden of proving that the goods were subject to seizure under the writ; and in doing so he must, of course, prove that the plaintiffs were not the lawful owners of them. In other words, that the right of the assignee in bankruptcy, whose right he represented in that suit, was superior to that of plaintiffs.

But the court said: "You shall not be permitted to prove that. If plaintiffs show that they were in possession, asserting ownership, you will not be allowed to contradict that assertion."

Such a proposition is opposed to all the analogies of the law.

If a writ be sued out of a court of competent jurisdiction, directing an officer to seize specifically described property, as in admiralty, replevin, or ejectment cases, it is a protection to the officer, when he is sued in trespass for executing it. If, however, it in general terms directs or authorizes him to seize the property of an individual, without a special description of it, he exercises the authority conferred at his own risk as regards the ownership of the property, and its liability to seizure under that process. Such is the rule applicable to an ordinary writ of attachment, and to a *fieri facias* at common law.

When, however, some one other than the defendant sues the officer for a wrongful levy of the writ, it has never been doubted that the title to the property and the rightfulness of the seizure under the writ were open to inquiry, and that unless the plaintiff made out his case before the jury, he must fail. This subject is fully considered by the court in *Buck* v. *Colbath*, 3 Wall. 334.

No just distinction can be seen between this latter class of cases and the one now under consideration. The act of Congress was designed to secure the possession of the property of the bankrupt, so that it might be administered under the proceedings in bankruptcy. Between the first steps initiating them and the appointment of the assignee, a considerable time often elapses, during which the effects of the bankrupt, especially in a case commenced by creditors, may be surreptitiously conveyed beyond the reach of the court or of the assignee, who, when appointed, is entitled to the possession of them. If the bankrupt does not voluntarily aid the court, or is inclined to defeat the proceedings, he can, with the aid of friends or irresponsible persons, sell his movable property and put the money in his pocket, or secrete his goods or remove them beyond the reach of the assignee or the process of the court, and thus defy the law. The evidence in this case shows the manner in which this can be done.

It was the purpose of the act of Congress to remedy this evil. It, therefore, provides that as soon as the petition in bankruptcy is filed, the court may issue to the marshal a provisional warrant, directing him to take possession of all the property and effects of the bankrupt, and hold them subject to the further order of the court. To have limited this right or duty of seizure to such property as he might find in the actual possession of the bankrupt would have manifestly defeated in many instances the purpose of the writ. There is, therefore, no such limitation expressed or implied. As in the writ of attachment, or the ordinary execution on a judgment for the recovery of money, the officer is authorized to seize the property of the defendant wherever found; so here it is made his duty to take into his possession the bankrupt's property wherever he may find it. It is made his duty to collect and hold possession until the assignee is appointed or the property is released by some order of court, and he would ill perform that duty if he should accept the statement of every man in whose custody he found property which he believed would belong to the assignee when appointed, as a sufficient reason for failing to take possession of it.

But he does this on his own responsibility for not only a faithful, but a correct, judgment in deciding what property to seize. He is liable to suit if by mistake he takes possession of property not liable to seizure under his warrant.

Such a suit was brought in this case; and we can see no reason why the issue made by the pleadings, namely, the true ownership of the property, should not have been fully submitted to the jury. It was the shortest way to determine the rights of the parties. It was the first time the issue was presented. It was before a court of competent jurisdiction.

To hold that the plaintiffs, by reason of their bare assertion of ownership connected with possession, must recover of the marshal the value of the property, and that the assignee could then have sued plaintiffs and recovered it from them, is a mode of doing justice that does not commend itself to our judgment, even if the assignee could be sure to find a responsible defendant when he came to sue.

We are of opinion that the Court of Appeals of New York

was in error in its construction of the bankrupt law and in affirming the instruction of the inferior court.

Judgment reversed, and cause remanded for further proceedings in conformity with this opinion.

COUNTY OF MOBILE v. KIMBALL.

1. The power conferred upon Congress by the commerce clause of the Constitution is exclusive, so far as it relates to matters within its purview which are national in their character, and admit or require uniformity of regulation affecting all the States. That clause was adopted in order to secure such uniformity against discriminating State legislation.
2. Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. To regulate it, as thus defined, there must be only one system of rules applicable alike to the whole country, which Congress alone can prescribe.
3. State legislation is not forbidden touching matters either local in their nature or operation, or intended to be mere aids to commerce, for which special regulations can more effectually provide, such as harbor pilotage, beacons, buoys, and the improvement of harbors, bays, and navigable rivers within a State, if their free navigation under the laws of the United States be not thereby impaired. Congress, by its non-action in such matters, virtually declares that, for the time being and until it deems fit to act, they may be controlled by State authority. The act of the State of Alabama, entitled "An Act to provide for the improvement of the river, bay, and harbor of Mobile," approved Feb. 16, 1867, is, therefore, not in conflict with the Constitution.
4. The provision for issuing bonds by the president and commissioners of revenue of Mobile County is not a taking of private property for public use, within the meaning of the Constitution of Alabama, nor can it be declared invalid, although it may impose upon one county the expense of an improvement in which the whole State is interested.
5. The harbor board was authorized by that act to provide for the contemplated improvement by entering into a contract therefor binding upon the county. If specific performance cannot for any reason be enforced in favor of the party who is thereunto entitled, on his completion of the work under the contract, a court of equity will adjudge that compensation in damages be made to him by the county.
6. A decree dismissing his bill *without prejudice* is not a bar to a subsequent suit for the same cause of action.

APPEAL from the Circuit Court of the United States for the Southern District of Alabama.

By an act of the General Assembly of Alabama, entitled "An Act for the improvement of the bay and harbor of Mobile," approved Feb. 21, 1860, the collector of customs for the port of Mobile, the mayor of the city of Mobile, and the president of the board of revenue for the county of Mobile, and their successors in office, were appointed *ex officio* a board to be styled the Board of Harbor Commissioners, for the purpose of causing the bay and harbor of Mobile to be deepened and improved. To aid the board in the performance of its powers and duties, the president and commissioners of revenue of the county were authorized and required from time to time, and as the same might be called for by the board, to issue the coupon bonds of the county, and to hand them over to the board to be sold. The proceeds were to be applied to the work as its necessities might require, and as authorized by the act. The whole amount of bonds was limited to $800,000. No steps were taken under the act. Another act was passed, Feb. 16, 1867, entitled "An Act to provide for the improvement of the river, bay, and harbor of Mobile." The president of the court of county commissioners of revenue of Mobile County, the mayor of Mobile, the president of the Bank of Mobile, the president of the Mobile Chamber of Commerce, and one citizen of the county of Mobile, to be appointed by the governor of the State, and their successors in office, were thereby constituted a board for the improvement of the river, harbor, and bay of Mobile. The president and commissioners of revenue of Mobile County were, by the second section, required to issue bonds for $1,000,000, payable as they might deem proper, to be delivered to the board whenever the latter might require them; and the court was required to levy and cause to be collected such tax as might be deemed proper to pay them.

The third and fourth sections are as follows: —

"SECT. 3. That said board for the improvement of the river, harbor, and bay of Mobile are hereby authorized to receive such bonds and apply them or the proceeds of them to the improvement, cleaning out, deepening, and widening of the river, harbor, and bay of Mobile, or any part thereof, or the making an artificial harbor

and such improvement, cleaning out, deepening and widening or any part thereof or all of it; or the making an artificial harbor shall be made in such manner as the said board may direct, and for that purpose they may make any rules and regulations and assess the dues or tolls to be collected on vessels or water-crafts, and do any act they may deem proper to effect the objects of this act.

"SECT. 4. That, in addition to the foregoing powers, the said commissioners are vested with the authority to purchase and condemn lands according to the provision of sect. 13 of an act for the improvement of the bay and harbor of Mobile, approved Feb. 21, 1860, and to take and receive all moneys, papers, books, records, and surveys, and all property pertaining to said commissioners, in said act, and the city of Mobile shall be vested with the title of all lands made by the deposits of all excavations in the progress of this work as provided for in said act, and the commissioners designated in this act, and all officers, clerks, and employés, shall be subjected to and be held liable to the duties, penalties, and punishments provided for in the fifteenth section of the said act."

The harbor board was organized under the provisions of this act, and on the 24th of June, 1872, it entered into a contract with Kimball and Slaughter for dredging a channel through Dog River Bar, in the bay of Mobile. The work was to be commenced by the first day of August, 1872, and completed on or before June 1, 1873. The harbor board agreed to pay the contractors 49½ cents per cubic yard of material excavated and removed, and payments were to be made in bonds of the county of Mobile issued under this act, at the rate of 82½ cents on the dollar.

The work under the contract was completed March 15, 1873, and on the following day it was accepted by the engineer in charge, whose action was approved by the board.

Prior to June 1, 1873, the court of county commissioners had issued to the harbor board two hundred bonds of $1,000 each. The president of the harbor board admitted, June 5, 1873, that Kimball and Slaughter were then entitled to seventeen bonds of $1,000 each, and he delivered a written statement to that effect. The board delivered eleven bonds to them, July 29, 1873, leaving due to them six bonds.

Kimball and Slaughter, in their bill filed against the county of Mobile, claim and aver that, after the delivery to them of the eleven bonds, the board had neither bonds, money, nor other means to pay them, and that all the two hundred bonds delivered to it had been applied to the purposes for which they had been issued.

An act of the legislature of April 19, 1873, limited to the sum of $200,000 the issue of county bonds to the board, and required the latter to file a statement of its receipts and expenditures with the judge of probate of Mobile County.

On the 25th of November, 1873, the complainants presented to the court of county commissioners their claim for six bonds of $1,000 each, or their value in money at 82½ cents on the dollar. The claim was rejected.

The bill avers that on the 8th of December, 1873, the complainants filed their bill in the Chancery Court at Mobile, against the county of Mobile, to compel it to deliver, through the commissioner of revenue, six bonds to them, or to require it to pay the moneyed value of the bonds, and the interest due thereon; that a decree was rendered for the complainants, which, on appeal to the Supreme Court of Alabama, was reversed, mainly upon the ground that it did not sufficiently appear that the harbor board had not fully accounted for the two hundred bonds, of $1,000 each, delivered to it by the court of commissioners of revenue of Mobile County. The Supreme Court adjudged that the bill be dismissed without prejudice.

The following act of the legislature of Alabama was passed: —

"*An Act to close the Accounts and settle the Contracts made by the Board for the Improvement of the River, Harbor, and Bay of Mobile.*

"SECT. 1. Be it enacted by the General Assembly of Alabama, that it shall be and is hereby made the duty of the president and commissioners of revenue of Mobile County to inquire into the validity and propriety of all claims which may be presented to them for work and labor done and materials furnished or services rendered on any contract or agreement with the said board, made or executed between the fifteenth day of June and the first day of July, in the year eighteen hundred and seventy-two, for the im-

provement of the river, harbor, and bay of Mobile, under the act approved February sixteenth, eighteen hundred and sixty-seven, entitled 'An Act to provide for the improvement of the river, bay, and harbor of Mobile:' *Provided*, such claim be presented to said president and commissioners within six months after the passage of this act; and upon the same being satisfactorily proved and shown to be still due and unpaid, it shall be the duty of said president and commissioners to provide for the payment thereof as of other claims against the county.

"Approved Feb. 23, 1876."

Under this act the complainants, April 3, 1876, presented to the court of county commissioners their claim for six bonds, or their value at 82½ cents on the dollar. The claim was rejected.

The complainants pray in their bill that the county be required to deliver to them six bonds of the county of $1,000 each, or pay their value at 82½ cents on the dollar, with interest from the completion and acceptance of the work.

The cause came on to be heard upon the pleadings and proofs, and a decree was rendered in favor of the complainants. The county then appealed here.

The remaining facts and the assignment of errors are set forth in the opinion of the court.

Mr. John T. Morgan for the appellant.

Mr. C. W. Jones for the appellees.

MR. JUSTICE FIELD delivered the opinion of the court.

The several positions taken by the appellant for the reversal of the decree of the Circuit Court may be resolved into these four: 1st, That the act of the legislature of Alabama of Feb. 16, 1867, "to provide for the improvement of the river, bay, and harbor of Mobile," is invalid, in that it conflicts with the commercial power vested in Congress; 2d, that if the act be not, for this reason, invalid, the expenses for the work authorized by it could not, under the Constitution of the State then in force, be imposed upon the county of Mobile, the work being for the benefit of the whole State; 3d, that the right of the complainants to relief is barred by a previous adjudication in the courts of the State against their claim; and, 4th, that the

case presented by the bill is not one for the cognizance of a court of equity. Each of these positions merits special consideration.

1. The act of Feb. 16, 1867, created a board of commissioners for the improvement of the river, harbor, and bay of Mobile, and required the president of the commissioners of revenue of Mobile County to issue bonds to the amount of $1,000,000, and deliver them, when called for, to the board, to meet the expenses of the work directed. The board was authorized to apply the bonds, or their proceeds, to the cleaning out, deepening, and widening of the river, harbor, and bay of Mobile, or any part thereof, or to the construction of an artificial harbor in addition to such improvement.

In June, 1872, the board of commissioners entered into a contract with the complainants, Kimball and Slaughter, to dredge and cut a channel through a designated bar in the bay, of specified width, depth, and distance, at a named price per cubic yard of material excavated and removed, and to receive in payment the bonds of the county, issued under the act mentioned, at the rate of 82½ cents on the dollar. In pursuance of this contract, the work agreed upon was at once undertaken by the complainants, and was completed by them in March, 1873, and accepted by the board through its authorized engineer. The amount due to them was paid, with the exception of seventeen bonds. The board gave them a certificate that they were entitled to that number of bonds, and, after some delay, delivered eleven to them. It is to obtain a delivery of the remaining six, or payment of their value, that the present suit is brought.

The objection that the law of the State, in authorizing the improvement of the harbor of Mobile, trenches upon the commercial power of Congress, assumes an exclusion of State authority from all subjects in relation to which that power may be exercised, not warranted by the adjudications of this court, notwithstanding the strong expressions used by some of its judges. That power is indeed without limitation. It authorizes Congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries, and between the

citizens of the several States, and to adopt measures to promote its growth and insure its safety. And as commerce embraces navigation, the improvement of harbors and bays along our coast, and of navigable rivers within the States connecting with them, falls within the power. The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the States which consists in the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulations, and that Congress alone can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens, and against the products and citizens of other States. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating State legislation.

Of the class of subjects local in their nature, or intended as mere aids to commerce, which are best provided for by special regulations, may be mentioned harbor pilotage, buoys, and beacons to guide mariners to the proper channel in which to direct their vessels.

The rules to govern harbor pilotage must depend in a great degree upon the peculiarities of the ports where they are to be enforced. It has been found by experience that skill and efficiency on the part of local pilots is best secured by leaving this subject principally to the control of the States. Their authority to act upon the matter and regulate the whole sub-

ject, in the absence of legislation by Congress, has been recognized by this court in repeated instances. In *Cooley* v. *Board of Wardens of the Port of Philadelphia*, the court refers to the act of Congress of 1789, declaring that pilots should continue to be regulated by such laws as the States might respectively thereafter enact for that purpose, and observes that "it manifests the understanding of Congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. The practice of the States and of the national government has been in conformity with this declaration, from the origin of the national government to this time; and the nature of the subject, when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience and conformed to local wants." 12 How. 299, 320.

Buoys and beacons are important aids, and sometimes are essential to the safe navigation of vessels, in indicating the channel to be followed at the entrance of harbors and in rivers, and their establishment by Congress is undoubtedly within its commercial power. But it would be extending that power to the exclusion of State authority to an unreasonable degree to hold that whilst it remained unexercised upon this subject, it would be unlawful for the State to provide the buoys and beacons required for the safe navigation of its harbors and rivers, and in case of their destruction by storms or otherwise it could not temporarily supply their places until Congress could act in the matter and provide for their re-establishment. That power which every State possesses, sometimes termed its police power, by which it legislates for the protection of the lives, health, and property of its people, would justify measures of this kind.

The uniformity of commercial regulations, which the grant to Congress was designed to secure against conflicting State provisions, was necessarily intended only for cases where such uniformity is practicable. Where from the nature of the subject or the sphere of its operation the case is local and limited, special regulations adapted to the immediate locality could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of

Congress, for when that acts the State authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by State authority.

The improvement of harbors, bays, and navigable rivers within the States falls within this last category of cases. The control of Congress over them is to insure freedom in their navigation, so far as that is essential to the exercise of its commercial power. Such freedom is not encroached upon by the removal of obstructions to their navigability or by other legitimate improvement. The States have as full control over their purely internal commerce as Congress has over commerce among the several States and with foreign nations; and to promote the growth of that internal commerce and insure its safety they have an undoubted right to remove obstructions from their harbors and rivers, deepen their channels, and improve them generally, if they do not impair their free navigation as permitted under the laws of the United States, or defeat any system for the improvement of their navigation provided by the general government. Legislation of the States for the purposes and within the limits mentioned does not infringe upon the commercial power of Congress; and so we hold that the act of the State of Alabama of Feb. 16, 1867, to provide for the "improvement of the river, bay, and harbor of Mobile," is not invalid.

There have been, it is true, expressions by individual judges of this court, going to the length that the mere grant of the commercial power, anterior to any action of Congress under it, is exclusive of all State authority; but there has been no adjudication of the court to that effect. In the opinion of the court in *Gibbons* v. *Ogden*, the first and leading case upon the construction of the commercial clause of the Constitution, and which opinion is recognized as one of the ablest of the great Chief Justice then presiding, there are several expressions which would indicate, and his general reasoning would tend to

the same conclusion, that in his judgment the grant of the commercial power was of itself sufficient to exclude all action of the States; and it is upon them that the advocates of the exclusive theory chiefly rely; and yet he takes care to observe that the question was not involved in the decision required by that case. "In discussing the question whether this power is still in the States," he observes that, "in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry, because it has been exercised, and the regulations which Congress deemed it proper to make are now in full operation. The sole question is, Can a State regulate commerce with foreign nations and among the several States while Congress is regulating it?" And the decision was necessarily restricted by the limitations of the question presented. It determined that the grant of power by the Constitution, accompanied by legislation under it, operated as an inhibition upon the States from interfering with the subject of that legislation. The acts of New York giving to Livingston and Fulton an exclusive right to navigate all the waters within its jurisdiction, with vessels propelled by steam, for a certain period, being in collision with the laws of Congress regulating the coasting trade, were, therefore, adjudged to be unconstitutional. This judgment was rendered in 1824. 9 Wheat. 1. Some years later (1829) the case of *Willson* v. *Blackbird Creek Marsh Company* came before the court. There a law of Delaware authorizing the construction of a bridge over one of its small navigable streams, which obstructed the navigation of the stream, was held not to be repugnant to the commercial power of Congress. The court, Chief Justice Marshall delivering its opinion, placed its decision entirely upon the absence of any congressional legislation on the subject. Its language was: "If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern States, — we should not feel much difficulty in saying that a

State law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States, — a power which has not been so exercised as to affect the question." 2 Pet. 245, 252.

In the *License Cases*, which were before the court in 1847, there was great diversity of views in the opinions of the different judges upon the operation of the grant of the commercial power of Congress in the absence of congressional legislation. Extreme doctrines upon both sides of the question were asserted by some of the judges, but the decision reached, so far as it can be viewed as determining any question of construction, was confirmatory of the doctrine that legislation of Congress is essential to prohibit the action of the States upon the subjects there considered.

But in 1851, in the case of *Cooley* v. *Board of Wardens of the Port of Philadelphia*, to which we have already referred, the attention of the court appears to have been for the first time drawn to the varying and different regulations required by the different subjects upon which Congress may legislate under the commercial power; and from this consideration the conclusion was reached, that, as some of these subjects are national in their nature, admitting of one uniform plan or system of regulation, whilst others, being local in their nature or operation, can be best regulated by the States, the exclusiveness of the power in any case is to be determined more by the nature of the subject upon which it is to operate than by the terms of the grant, which, though general, are not accompanied by any express prohibition to the exercise of the power by the States. The decision was confined to the validity of regulations by the States of harbor pilotage; but the reasoning of the court suggested as satisfactory a solution as perhaps could be obtained of the question which had so long divided the judges. The views expressed in the opinion delivered are followed in *Gilman* v. *Philadelphia* (3 Wall. 713), and are mentioned with approval in *Crandall* v. *State of Nevada*, 6 id. 35. In the first of these cases the court, after stating that some subjects of commerce call for uniform rules and national legislation, and

that others can "be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively," says, "whether the power in any given case is vested exclusively in the general government depends upon the nature of the subject to be regulated." This doctrine was subsequently recognized in the case of *Welton* v. *State of Missouri* (91 U. S. 275), in *Henderson* v. *Mayor of New York* (92 id. 259), and in numerous other cases; and it may be considered as expressing the final judgment of the court.

Perhaps some of the divergence of views upon this question among former judges may have arisen from not always bearing in mind the distinction between commerce as strictly defined, and its local aids or instruments, or measures taken for its improvement. Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate States is not, therefore, permissible. Language affirming the exclusiveness of the grant of power over commerce as thus defined may not be inaccurate, when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce.

2. The second objection of the appellant to the decree of the Circuit Court is equally as untenable as the first. The question of the validity of the act of Feb. 16, 1867, under the Constitution of Alabama at the time in force, was before the Supreme Court of the State in 1871. It was contended that the act contravened the article which forbade the taking of private property for public use without just compensation, or for private use, or the use of corporations other than municipal, without the consent of the owner, and the article which restrained the legislature from delegating power to levy taxes to individuals or private corporations. The court held that the act was not open to objection on either of these grounds, except

perhaps in the clause which authorized the board of commissioners to assess dues or tolls to be collected on vessels or water-craft; and if that clause could be deemed a delegation of the taxing power under the article mentioned, that portion only of the act was invalid. The issue by the president and commissioners of revenue of Mobile County of bonds for the improvement of the river, bay, and harbor of Mobile was not a taking of private property for public use, within the meaning of the constitutional clause. It was a loan of the credit of the county for a work public in its character, designed to be of general benefit to the State, but more especially and immediately to the county. The expenses of the work were of course to be ultimately defrayed by taxation upon the property and people of the county. But neither is taxation for a public purpose, however great, the taking of private property for public use, in the sense of the Constitution. Taxation only exacts a contribution from individuals of the State or of a particular district, for the support of the government, or to meet some public expenditure authorized by it, for which they receive compensation in the protection which government affords, or in the benefits of the special expenditure. But when private property is taken for public use, the owner receives full compensation. The taking differs from a sale by him only in that the transfer of title may be compelled, and the amount of compensation be determined by a jury or officers of the government appointed for that purpose. In the one case, the party bears only a share of the public burdens; in the other, he exchanges his property for its equivalent in money. The two things are essentially different.

The objection to the act here raised is different from that taken in the State court. Here the objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole State. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties, or other particular subdivisions of the State, or lay the greater share

or the whole upon that county or portion of the State specially and immediately benefited by the expenditure.

It may be that the act in imposing upon the county of Mobile the entire burden of improving the river, bay, and harbor of Mobile is harsh and oppressive, and that it would have been more just to the people of the county if the legislature had apportioned the expenses of the improvement, which was to benefit the whole State, among all its counties. But this court is not the harbor, in which the people of a city or county can find a refuge from ill-advised, unequal, and oppressive State legislation. The judicial power of the Federal government can only be invoked when some right under the Constitution, laws, or treaties of the United States is invaded. In all other cases, the only remedy for the evils complained of rests with the people, and must be obtained through a change of their representatives. They must select agents who will correct the injurious legislation, so far as that is practicable, and be more mindful than their predecessors of the public interests.

3. The objection that the right of the complainants to relief is barred by a previous adjudication in the courts of the State against their claim arises in this wise: After the complainants had performed their work on the harbor of Mobile under the contract with the harbor commissioners, of June, 1872, and the work had been approved and accepted, the legislature passed the act of April 19, 1873, to regulate the further proceedings of the board, restricting the issue of bonds to the amount, including those already issued, of $200,000, and declaring that the harbor board should not, under any pretence whatever, be entitled to receive bonds to any greater amount. Bonds to that amount had already been delivered to the board, and for six of them, the number to which they were entitled, the complainants applied. The delivery of the bonds being refused, they brought suit against the county of Mobile to obtain them or their value.

Two grounds were alleged on which the responsibility of the county was asserted: one, that the harbor board had ceased to have anything to do with the improvement of the river, bay, and harbor of Mobile, and had turned over all the money and bonds left in its possession to the officials of the county; the other,

that the county through its officials had bought from the harbor board thirty-one of the two hundred bonds issued, at a price less than their market value, and had refused to deliver to the complainants the six due to them which they had demanded.

The District Court gave a decree for the complainants, but the Supreme Court reversed it, holding that upon the first ground the complainants were mistaken as to the situation of the harbor board, and that it continued to exist for the purpose of winding up and settling its business; and upon the second ground, that although thirty-one of the bonds had been purchased as stated, they had been cancelled before the complainants made the demand for six of them; and it was shown by the county that there still remained with the harbor board unaccounted for twenty-three of the two hundred bonds, which were more than sufficient to pay the complainants and other debts which the board owed. The court therefore decided that the delinquency complained of was that of the harbor board and not of the county; that the only obligations imposed upon the county were that it should issue its bonds upon the demand of the harbor board, and pay them according to their stipulations; and as it appeared that the county officials had delivered to the board the whole amount of the bonds demanded, and that this amount was ample for the fulfilment of the obligations contracted for, the suit could not be maintained. The decree was, therefore, reversed and the bill dismissed, but *without prejudice*, — a condition which prevented the adjudication from operating as a bar to the same claim, if the complainants could in another suit obviate the defects of the existing bill. In the present suit they have obviated these defects. They allege and prove that the harbor board had disposed of all the bonds it had received before the passage of the act of April 19, 1873, restricting the number to be issued, and that it had turned over to the officials of the county neither bonds nor proceeds to meet the demand of the complainants. The two suits, though seeking the same relief, rest upon a different state of facts, and the adjudication in the one constitutes, therefore, no bar to a recovery in the other.

4. But it is finally objected that the case presented by the bill is not one for the cognizance of a court of equity. This objec-

tion is important only from the supposed effect of the decision of the Supreme Court of the State in the first suit against the county brought by the complainants. It appears to have been taken for granted by counsel, and also by the court below, that the Supreme Court of the State had decided that the harbor board was not the agent of the county in making the contract with the complainants. We do not so read its opinion. It only says that the board was created by the General Assembly of the State, and was not an agent *appointed* by the county of Mobile. It does not state that the board was not an agent of the county, but only that its appointment was not from the county, and that it drew its existence and authority from the statute of the State. It is not necessary to constitute an agency of a political subdivision of a State that its officials should be elected by its people or be appointed with their assent. It is enough to give them that character that, however appointed, they are authorized by law to act for the county, district, or other political subdivision. Here, the harbor board, created by a law of the State, was authorized to make contracts for a public work in which the county was specially interested, and by which it would be immediately and directly benefited, and to require obligations of the county to meet the expenses incurred. It is a mere battle of words to contend that it was, or was not, an agent of the county because its members were appointed by some exterior authority. It is enough in this case that by force of the law of its creation it could bind the county for work for which it contracted. Having thus bound the county, the contractors are entitled to the bonds stipulated, or their equivalent in money. If for any cause, the repeal of the law creating the harbor board, or the refusal of its members or other officials to act, the contract cannot be specifically enforced, a court of equity will order compensation in damages from the party ultimately liable. That court will free the case from all technical embarrassments, to the end that justice may be done to those who have trusted to the law, and the responsibility of parties receiving benefits under it. The case here is not different in principle from the ordinary case of a party being unable to comply with his contract when specific performance is demanded. If, for example, there be a contract for the pur-

chase of land with which the purchaser has complied, but in which the vendor has failed, a court of equity will take jurisdiction; and if it be seen that the vendor, from subsequent sales or otherwise, cannot comply with a decree for a specific performance, the court will adjudge compensation in damages. So here, the court will grant the relief which the complainants, under their contract, are entitled to have, if such relief can be obtained from the county; but if by reason of intervening obstacles since the contract was made whether arising from laches or default of its officials or repealing legislation, this cannot be secured, an alternative and compensatory decree, that is, one for a money equivalent in the form of damages, will be directed. And as this has been done in the present case, the decree is

Affirmed.

TILGHMAN *v.* PROCTOR.

1. Letters-patent for a process, irrespective of the particular mode or form of apparatus for carrying it into effect, are admissible under the patent laws of the United States.
2. To sustain such letters, the patentee should be the first and original inventor of the process, and claim it in them. If the means of carrying it out are not obvious to ordinary mechanics skilled in the art, his specification should describe some mode of carrying it out which will produce a useful result.
3. A party who subsequently discovers a new mode of carrying out a patented process, and obtains letters-patent therefor, is not entitled to use the process without the consent of the patentee thereof.
4. *Mitchell* v. *Tilghman* (19 Wall. 287) reviewed and overruled; and the letters-patent No. 11,766, granted Oct. 3, 1854, to Richard A. Tilghman, and subsequently renewed and extended, relating to the manufacture of fat acids, sustained as letters for a process.
5. *O'Reilly* v. *Morse* (15 How. 62) and *Neilson* v. *Thompson* (Web. P. C. 275) commented upon and explained.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

This is a suit in equity brought by Richard A. Tilghman, against William Proctor, James Gamble, W. A. Proctor, James

N. Gamble, and George H. Proctor, complaining of their infringement of letters-patent No. 11,766, granted to him, bearing date Oct. 3, 1854, and subsequently renewed and extended, for a process for obtaining free fat acids and glycerine from fatty bodies. The answer denies the validity of the letters and the alleged infringement of them. On a final hearing upon the pleadings and proofs, the bill was dismissed, and he appealed. The case is fully stated in the opinion of the court.

Mr. George Harding for the appellant.

Mr. Charles B. Collier and *Mr. Matthew H. Carpenter* for the appellees.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case involves a consideration of the same patent which was the subject of litigation in the case of *Mitchell* v. *Tilghman*, reported in 19th Wallace, 287. The evidence in the present case, which is quite an unwieldy mass, is much the same as in that, being supplemented, however, by the testimony of the patentee respecting the nature of his original experiments and the practicability of using profitably the coil apparatus described in the patent, together with certain exhibits relating to the novelty of the alleged invention. Upon the renewed consideration which has been given to the subject, the court is unanimously of opinion, contrary to the decision in the Mitchell case, that the patent of Tilghman must be sustained as a patent for a process, and not merely for the particular mode of applying and using the process pointed out in the specification, and that the defendants have infringed it by the processes used by them.

The patent in question relates to the treatment of fats and oils, and is for a process of separating their component parts so as to render them better adapted to the uses of the arts. It was discovered by Chevreul, an eminent French chemist, as early as 1813, that ordinary fat, tallow, and oil are regular chemical compounds, consisting of a base which has been termed glycerine, and of different acids, termed generally fat acids, but specifically, stearic, margaric, and oleic acids. These acids, in combination severally with glycerine, form stearine, margarine, and oleine. They are found in different

proportions in the various neutral fats and oils; stearine predominating in some, margarine in others, and oleine in others. When separated from their base (glycerine), they take up an equivalent of water, and are called free fat acids. In this state they are in a condition for being utilized in the arts. The stearic and margaric acids form a whitish, semi-transparent, hard substance, resembling spermaceti, which is manufactured into candles. They are separated from the oleic acid, which is a thin oily fluid, by hydrostatic or other powerful pressure; the oleine being used for manufacturing soap, and other purposes. The base, glycerine, when purified, has come to be quite a desirable article for many uses.

The complainant's patent is dated the third day of October, 1854, and relates back to the ninth day of January of that year, being the date of an English patent granted to the patentee for the same invention. It has but a single claim, the words of which are as follows: "Having now described the nature of my said invention, and the manner of performing the same, I hereby declare that I claim, as of my invention, the manufacturing of fat acids and glycerine from fatty bodies by the action of water at a high temperature and pressure."

In the case of Mitchell, the majority of the court was of opinion that in the application of the process thus claimed the patentee was confined to the method of using the process particularly pointed out in the specification; and as, by that, it was proposed to produce a very rapid separation of the fatty elements by the use of a high degree of heat, the operation being effected in the space of ten minutes by forcing the fat, mixed with water, through a long coil of strong iron tube passing through an oven or furnace where it was subjected to a temperature equal to that of melting lead, or 612° Fah.; it was concluded by the court that the producing of the same result in a boiler subjected to only 400° Fah., and requiring a period of several hours to effect the desired separation, was not an infringement of the patent, although the process by which the effect was produced — namely, the action of water, in intimate mixture with the fat, at a high temperature and under a sufficient pressure to prevent the formation of steam — was undoubt-

edly the same. On further reflection, we are of opinion that, in the case referred to, sufficient consideration was not given to the fact that the patent is for a process, and not for any specific mechanism for carrying such process into effect.

In order to have a clearer understanding of the question, it is necessary to advert briefly to the history of the art, and then to examine the terms of the patent in greater detail.

It is conceded by the complainant that two different processes for effecting a decomposition of fats into their component elements had been in practical operation prior to his invention. These processes were called respectively the alkaline saponification process, and the sulphuric-acid distillation process. The first consisted of the manufacture of the fat into soap by the use of lime or other alkali; and then, of the decomposition of the soap, so produced, into the fat acids by the aid of hydrochloric or dilute sulphuric acid. The decomposition of the soap was, by a subsequent improvement, effected by distillation in an atmosphere of steam. The other process, called the sulphuric-acid distillation process, consisted of the direct saponification of fat by means of concentrated sulphuric acid, and the subsequent distillation over of the resulting fatty acids. In this process, however, the glycerine was destroyed.

The first of these processes was patented by Gay Lussac and Chevreul in 1825, but was not brought into successful operation in the manufacture of stearic candles until improved by De Milly in 1831. The second process was proposed and developed between 1840 and 1850. It was extensively used during and after that period by the large manufacturing firm of E. Price & Co., of London, and their successors, Price's Patent Candle Company. Mr. G. F. Wilson, one of the shareholders in that establishment, and apparently a man of accurate knowledge on this subject, read various papers illustrative of the history of the manufacture before learned societies in England, extracts from which are contained in the record, and throw considerable light on the matter. It appears from his statements that the distillation of the saponified fat, whether saponified by an alkali or by sulphuric acid, was often accompanied by prejudicial effects from the access of atmospheric air to the contents of the still. To remedy this,

he and his associates adopted and patented the introduction of superheated steam into the still or vat containing the fat acids, which excluded atmospheric air, and carried over the fatty vapors into the receiver in a more perfect condition than they had before been able to obtain them. These patents were taken out in 1843. In the following year, the same parties, Gwynne and Wilson, found, what Dubrunfaut had found two or three years before, that palm-oil, which is very fusible and manageable, can be distilled in its crude state, in the manner last described, that is, by the introduction of steam into the still, without the intervention of saponification; and the distilled product being then steam-boiled in water, acidulated with sulphuric acid, and the water allowed to settle and separate, the resulting substance would be a fat acid. It is not shown that this process was ever carried into successful operation prior to Tilghman's patent; and judging from what was done by the Price Patent Candle Company in the way of improvement immediately after becoming acquainted with Tilghman's process, it is to be inferred that the steam-distillation process (without saponification) was still an unsuccessful experiment when his patent was issued. This experiment, however, must be regarded as the nearest approach to the process of Tilghman of anything done in the art prior to it.

We do not regard the accidental formation of fat acid in Perkins's steam cylinder from the tallow introduced to lubricate the piston (if the scum which rose on the water issuing from the ejection pipe was fat acid) as of any consequence in this inquiry. What the process was by which it was generated or formed was never fully understood. Those engaged in the art of making candles, or in any other art in which fat acids are desirable, certainly never derived the least hint from this accidental phenomenon in regard to any practicable process for manufacturing such acids.

The accidental effects produced in Daniell's water barometer and in Walther's process for purifying fats and oils preparatory to soap-making, are of the same character. They revealed no process for the manufacture of fat acids. If the acids were accidentally and unwittingly produced, whilst the operators were in pursuit of other and different results, without exciting

attention and without its even being known what was done or how it had been done, it would be absurd to say that this was an anticipation of Tilghman's discovery.

Nor do we regard the patent of Manicler, which was taken out in 1826, as anticipating the process of Tilghman. It is true that he directs a mixture of fat with about one-quarter of its weight of water to be placed in a boiler, and subjected to a heat sufficient to create a pressure equal to one atmosphere above the natural atmospheric pressure (or about 250° Fah.); the boiler being provided with a safety-valve which would secure that degree of pressure. But, subject to this pressure, the patent directed that the mixture should be made to boil, and of course that the water should be converted into steam: the words are, "Apply fire to this digester to melt and digest the contained tallow or fat and water and keep up a rapid ebullition during about six hours." It is probable, therefore, that any decomposition of the fat which may have been produced by this process was due to the steam formed and passing through the fat, as no means appears to have been adopted for keeping up the mixture of the fat and water. But we have no evidence that the process was ever successful in practice. One of the defendants' witnesses testifies that he tried it, and though he got some results, he adds this pregnant observation: "To transform all the fat in this way at so low a temperature would have required many days." He only pretends that the sample which he obtained showed by its appearance, as well as by its acid action, that the separation had commenced. Evidently, therefore, this was but an abandoned experiment, since we never hear any more of it from 1826 down to the trial of this cause.

It is unnecessary to examine in detail other alleged anticipations of Tilghman's process. We believe that we have specified the most prominent and reliable instances.

Tilghman's discovery was made in 1853, and was, in brief, this: "That the fat acids can be separated from glycerine, without injury to the latter, by the single and simple process of subjecting the neutral fat, whilst in intimate mixture with water, to a high degree of heat under sufficient pressure to prevent the water from being converted into steam, without the

employment of any alkali or sulphuric acid, or other saponifying agent; the operation, even with the most solid fats, being capable of completion in a very few minutes when the heat applied is equal to that of melting lead, or 612° Fah.; but requiring several hours when it is as low as 350° or 400° Fah. The only conditions are, a constant and intimate commixture of the fat with the water, a high degree of heat, and a pressure sufficiently powerful to resist the conversion of the water into steam. The result is, a decomposition of the fatty body into its elements of glycerine and fat acids, each element taking up the requisite equivalent of water essential to its separate existence, and the glycerine in solution separating itself from the fat acids by settling to the bottom when the mixed products are allowed to stand and cool. In this process a chemical change takes place in the fat in consequence of the presence of the water and the active influence of the heat and pressure upon the mixture.

We are satisfied that Tilghman was the original discoverer of this process. His priority was acknowledged at the time by those most interested to question it. Mr. Wilson, to whose statements reference has been made, and who is perhaps more justly entitled than any one else to claim an anticipation of Tilghman's discovery, makes no such pretension, but, on the contrary, concedes Tilghman's right to priority; and, indeed, Price's Patent Candle Company, of which Mr. Wilson was a member and director, took a license under Tilghman's English patent.

As having some bearing upon the proper construction of the patent in suit (which will presently be more particularly examined), it is proper to observe that Tilghman's actual invention, as demonstrated in his experiments made in 1853, before making any application for a patent, was not confined to the use of a coil of pipe in a heated chamber or furnace for effecting the process which he claims, but was frequently exhibited by using a simple digester, filled nearly full with a mixture of fat and water, and heated in a gas stove, or in a vertical position over a gas lamp; the mixture of fat with the water being kept up by a loose metallic rod or jumper, which thoroughly mixed the contents when the digester was shaken. Sometimes

the digester was heated in a horizontal position, and, being provided with thin copper partitions fixed inside, was made to revolve in order to cause a more perfect mixture of the materials. In using the digester, it not being provided with a safety-valve, a small space was left at the top for the formation of sufficient steam to prevent, by its elasticity, the vessel from exploding.

In making these experiments Tilghman not only varied the apparatus, but applied different degrees of heat in the operation. The following is his account of some of these proceedings. He says: "Before applying for my patent I had made many experiments in decomposing by water at temperatures below melting bismuth, sometimes in the coil form of apparatus, but most frequently in digesters. The lowest temperature tried by me was three hundred and fifty degrees Fah. (350° F.), or 120 pounds pressure continued for four hours. The digester was as usual in a vertical position, but the heat was in this case given by an oil-bath. I obtained both fat acids and glycerine in this experiment, but in such small quantities as to prove that though the decomposition did go on at that heat, yet it was very slow compared with the higher heats. I find notes of another experiment, July 15, 1854, in the coil apparatus, with palm-oil, made at the melting-point of tin, 440° Fah., 360 pounds pressure. It was pumped through the coil very slowly, so as to give about thirty minutes' heat, and found to be partly decomposed, so that it was returned to the inlet end of the apparatus and pumped through a second time at the same rate and heat, which produced perfect decomposition of the palm-oil into fat acids and solution of glycerine. Ten minutes' exposure would have perfectly decomposed palm-oil at the heat of melting bismuth, 510° Fah. Yet I found 70° lower heat required six times as long to produce the same effect. I had often decomposed tallow at 510° Fah. before taking out my patent, not in the coil apparatus, but in the simple vertical digester. In this case I had to allow increased time on account of the imperfect contact of the fat and water in addition to that required by the diminished temperature."

In the course of his testimony, Tilghman explains why, in his patent, he specially recommended the use of the high tem-

perature of melting lead in applying his process to practical use. He says: "Many experiments had shown me that at these higher temperatures the decomposition was carried on with the greatest economy of fuel and cost of apparatus. When in London in 1847, I had found Perkins' house-warming apparatus, consisting of coils of hundreds of feet of pipe, containing water at the temperature of melting lead, had long been in extensive domestic use there. On returning to London in 1853, I found the same apparatus largely used for heating bakers' ovens. As I thus found such heats and pressures were perfectly practical and safe, as well as economical, I thought I was bound to describe my invention in what I then believed to be the best mode of carrying it out, and that, as I was the discoverer of the chemical fats, I could then claim broadly as my process the use of water highly heated and under pressure to decompose fats, no matter what temperature or apparatus was used."

And being asked for his present view as to the practicability, economy, and safety of the higher temperatures as compared with lower temperatures, he said: "I think the high-pressure apparatus is much more economical, both in the first cost and in the expense of working. Its principal disadvantage is that ordinary engineers are not familiar with its management, and consequently dislike it."

In December, 1853, Tilghman, having completed his experiments to his own satisfaction, filed a caveat in the Patent Office preparatory to taking out a patent for his invention. In this caveat he says: "The invention consists in subjecting animal and vegetable fatty and oily substances containing glycerine to a high temperature and pressure in close vessels, mixed with different agents, according to the effect desired to be produced upon the fatty matter. Thus, when I wish to convert the neutral fatty substances into fatty acids and glycerine, I pump a mixture of the fat and water, under great pressure, through a series of strong metal tubes, kept at about the heat of melting lead, and provided with a cooling-worm and safety-valve at its outlet. The neutral fatty substance is decomposed by the process, and the fat acid and solution of glycerine which issue through the safety-valve separate by settling."

Tilghman soon after repaired to England and took out a patent there, dated the ninth day of January, 1854, and sealed the 25th of March. He immediately put in operation an apparatus for exhibiting his process on a small scale. Mr. Wilson, before mentioned, witnessed his experiments, and thus speaks of them in a paper communicated to the Journal of the Society of Arts, Jan. 25, 1856: —

"In January, 1854, Mr. Tilghman, an American chemist, who has studied all that has been published here and in France on the subject of acidification and distillation of fatty bodies, obtained a patent for exposing fats and oils to the action of water at a high temperature and under great pressure, in order to cause the combination of the water with the elements of the neutral fats, so as to produce at the same time free fat acids and solution of glycerine. He proposed to effect this by pumping a mixture of fat and water, by means of a force-pump, through a coil of pipe heated to about 612° Fah., kept under a pressure of about 2,000 pounds to the square inch; and he states that the vessel must be closed, so that the requisite amount of pressure may be applied to prevent the conversion of water into steam. This is, all must admit, a beautiful, original, chemical idea, well carried out; it has yet to prove how far it can compete successfully with distillation. We have made an arrangement with Mr. Tilghman which will give us the means of testing its commercial merits."

Mr. Wilson goes on to state that this process of Tilghman suggested to them the idea of distilling fats by passing steam into them at a high temperature whereby to resolve them into glycerine and fat acids. They found the plan successful, and that the glycerine distilled over with the fat acids, but no longer combined with them; and, in July, 1854, they took out a patent for that process. In a paper read before the Glasgow meeting of the British Association for the Advancement of Science, in September, 1855, Mr. Wilson thus refers to the course of discovery which took place in this branch of manufacture: —

"By our first improvement in separating the fat acids from neutral fats, the glycerine was decomposed by the direct action of concentrated sulphuric acid at a high temperature, and all that remained of it was a charred precipitate. A new process for decom-

posing neutral fats by water under great pressure coming under our notice" [referring to Tilghman's process] "led us to look again more closely into our old distilling processes, and the doing this showed, what we had often been on the brink of discovering, that glycerine might be distilled.

"In our new process the only chemical agents employed for decomposing the neutral fat, and separating its glycerine, are steam and heat; and the only agents used in purifying the glycerine thus obtained are heat and steam; thus all trouble from earthy salts or lead is escaped.

"Distillation, however, purifies the impure glycerine of the old sources.

"On the table is a series of products of palm-oil, which will serve to illustrate the process. Steam, at a temperature of from 550° to 600° Fah., is introduced into a distillery apparatus containing a quantity of palm-oil. The fatty acids take up their equivalents of water, and the glycerine takes up its equivalent; they then distil over together. In the receiver the condensed glycerine, from its higher specific gravity, sinks below the fat acids."

We quote more fully from this paper, because it is a contemporary acknowledgment, made by a man who stood in the front rank of those who understood, and whose interest it was to understand, the most advanced process of resolving fats and oils into their component parts, that Tilghman's "process for decomposing neutral fats by water under great pressure" was "a new process;" and who, with his associates, took hints from it for making new departures and improvements in the art. The statements of Mr. Wilson on this subject are corroborated by other witnesses. Indeed, nearly all those competent to speak on the subject state, or admit, that the process of decomposing fats into glycerine and fat acids by mixing them with water, and subjecting the mixture to a high degree of heat under a pressure sufficient to prevent the conversion of the water into steam, was not known in the arts prior to Tilghman's discovery. The testimony of some experts to the contrary is based upon their construction of certain patents and publications produced in evidence, the most important of which have already been adverted to.

The question then arises, Has Tilghman secured the exclusive right to the process of which he was thus the inventor?

An examination of the patent itself, which the preceding remarks will enable us better to understand, will show, we think, that it was intended to and does cover and secure to the patentee the general process which has been described, although only one particular method of applying and using it is pointed out.

The specification describes the invention as follows: —

"My invention consists of a process for producing free fat acids and solution of glycerine from those fatty and oily bodies of animal and vegetable origin which contain glycerine as their base. For this purpose, I subject these fatty or oily bodies to the action of water at a high temperature and pressure, so as to cause the elements of those bodies to combine with water, and thereby obtain at the same time free fat acids and solution of glycerine. I mix the fatty body to be operated upon with from a third to a half of its bulk of water, and the mixture may be placed in any convenient vessel in which it can be heated to the melting-point of lead, until the operation is complete. The vessel must be closed and of great strength, so that the requisite amount of pressure may be applied to prevent the conversion of the water into steam.

"The process may be performed more rapidly and also continuously by causing the mixture of fatty matter and water to pass through a tube or continuous channel, heated to the temperature already mentioned; the requisite pressure for preventing the conversion of water into steam being applied during the process; and this I believe is the best mode of carrying my invention into effect. In the drawing hereunto annexed are shown figures of an apparatus for performing this process speedily and continuously, but which apparatus I do not intend to claim as any part of my invention."

The specification then goes on to describe, by the aid of the drawing referred to, the particular device mentioned. But it is evident, and indeed is expressly announced, that the process claimed does not have reference to this particular device, for the apparatus described was well known, being similar to that used for producing the hot-blast and for heating water for the purpose of warming houses. It consists of a coil of iron pipe, or other metallic tubing, erected in an oven or furnace, where it can be subjected to a high degree of heat; and through this pipe the mixture (of nearly equal parts of fat and water), made

into an emulsion in a separate vessel by means of a rapidly vibrating piston, or dasher, is impelled by a force-pump in a nearly continuous current, with such regulated velocity as to subject it to the heat of the furnace for a proper length of time to produce the desired result; which time, when the furnace is heated to the temperature of 612° Fah., is only about ten minutes. The fat and water are kept from separating by the vertical position of the tubes, as well as by the constant movement of the current; and are prevented from being converted into steam by weighting the exit valve by which the product is discharged into the receiving vessel, so that none of it can escape except as it is expelled by the pulsations produced by the working of the force-pump. Before arriving at the exit valve, the pipe is passed, in a second coil, through an exterior vessel filled with water, by which the temperature of the product is reduced. After the product is discharged into the receiving vessel, it is allowed to stand and cool until the glycerine settles to the bottom and separates itself from the fat acids. The latter are then subjected to washing and hydraulic pressure in the usual way.

After describing this apparatus it is added: —

"Although the decomposition of the neutral fats by water takes place with great quickness at the proper heat, yet I prefer that the pump should be worked at such a rate, in proportion to the length or capacity of the heating tubes, that the mixture, while flowing through them, should be maintained at the desired temperature for ten minutes before it passes into the refrigerator or cooling part of the apparatus."

It is evident that the passing of the mixture of fat and water through a heated coil of pipe standing in a furnace is only one of several ways in which the process may be applied. The patentee suggests it as what he conceived to be the best way, apparently because the result is produced with great rapidity and completeness. But other forms of apparatus, known and in public use at the time, can as well be employed without changing the process. A common digester, or boiler, can evidently be so used, provided proper means are employed to keep up the constant admixture of the water and fat, which

is a *sine qua non* in the operation. Tilghman himself, as we have seen, often used such digesters in making his experiments before applying for his patent; and, in putting up machinery for his licensees after his patent was obtained, he did the same thing when the parties desired it. Yet surely the identity of the process was not changed by thus changing the form of apparatus. No great amount of invention was required to adapt different forms of well-known apparatus to the application of the process. The principal difficulty would be in providing an internal arrangement in the boiler, or digester, for successfully keeping up the intimate commixture of the fat and water. It is evident that this could be accomplished by means of revolving reels armed with buckets, or of a force-pump constantly transferring the heavy stratum of water from the bottom of the mass to the top, aided by horizontal diaphragms partially sectionizing the digester. These devices were resorted to by Tilghman and others when they used a boiler instead of a coil of pipe.

Whilst Tilghman in his patent recommends the high degree of heat named, he does not confine himself to that. It had been fully developed in his experiments, and was well known to him, that a lower degree of heat could be employed by taking longer time to perform the operation; and this would be necessary when boilers, or digesters, of considerable size were used instead of the coil of pipe, on account of the decreasing power of large vessels to resist the internal pressure. The specification, after describing the use of a metallic coil of pipe, proceeds to add: —

"The melting-point of lead has been mentioned as the proper heat to be used in this operation, because it has been found to give good results. But the change of fatty matters into fat acid and glycerine takes place with some materials (such as palm-oil) at or below the melting-point of bismuth [510° Fah.]; yet the heat has been carried considerably above the melting-point of lead without any apparent injury, and the decomposing action of the water becomes more powerful as the heat is increased. By starting the apparatus at a low heat, and gradually increasing it, the temperature giving products most suitable to the intended application of the fatty body employed can easily be determined."

Now, when we find it stated, as we do in this specification, that the patentee subjects "fatty or oily bodies to the action of water at a high temperature and pressure, so as to cause the elements of those bodies to combine with water;" that "the mixture may be placed in any convenient vessel in which it can be heated to the melting-point of lead, until the operation is complete;" that "the vessel must be closed and of great strength, so that the requisite amount of pressure may be applied to prevent the conversion of the water into steam;" that "the decomposition of the neutral fats by water takes place with great quickness at the proper heat;" that "the melting-point of lead has been mentioned as the proper heat to be used in this operation, because it has been found to give good results;" that "the change of fatty matters into fat acid and glycerine takes place with some materials at or below the melting-point of bismuth;" that "the decomposing action of water becomes more powerful as the heat is increased;" that "by starting the apparatus at a low heat, and gradually increasing it, the temperature giving products most suitable to the intended application of the fatty body employed can easily be determined;" and when we then find that the patentee categorically claims, in general terms, as his invention "*the manufacturing of fat acids and glycerine from fatty bodies by the action of water at a high temperature and pressure;*" and being satisfied that he was, in fact, the inventor of the general process described and bodied forth in the specification, — how can we, by any fair rule of construction, circumscribe this claim in such a manner as that it shall only cover the process when applied in the use of a coil of pipe heated to 612° Fahrenheit? Or, if we allow it to embrace any "convenient vessel," and do not confine it to a coil of pipe, how can we confine it to a particular degree of heat? What did Tilghman discover? And what did he, in terms, claim by his patent? He discovered that fat can be dissolved into its constituent elements by the use of water alone under a high degree of heat and pressure; and he patented *the process* of "manufacturing fat acids and glycerine from fatty bodies by the action of water at a high temperature and pressure." Had the process been known and used before, and not been Tilghman's invention, he could not then have claimed anything more than the

particular apparatus described in his patent; but being the inventor of the process, as we are satisfied was the fact, he was entitled to claim it in the manner he did.

That a patent can be granted for a process, there can be no doubt. The patent law is not confined to new machines and new compositions of matter, but extends to any new and useful art or manufacture. A manufacturing process is clearly an art, within the meaning of the law. Goodyear's patent was for a process, namely, the process of vulcanizing india-rubber by subjecting it to a high degree of heat when mixed with sulphur and a mineral salt. The apparatus for performing the process was not patented, and was not material. The patent pointed out how the process could be effected, and that was deemed sufficient. Neilson's patent was for the process of applying the hot-blast to furnaces by forcing the blast through a vessel or receptacle situated between the blowing apparatus and the furnace, and heated to a red heat; the form of the heated vessel being stated by the patent to be immaterial. These patents were sustained after the strictest scrutiny and against the strongest opposition.

On the subject of patents for processes, Mr. Justice Grier, in delivering the opinion of this court in *Corning* v. *Burden*, said: "A process *eo nomine* is not made the subject of a patent in our act of Congress. It is included under the general term, 'useful art.' An art may require one or more processes in order to produce a certain result or manufacture. The term 'machine' includes every mechanical device or combination of mechanical powers and devices to perform some function or to produce a certain effect or result. But where the result or effect is produced by chemical action, by the operation or application of some element or power of nature, or of one substance to another, such modes, methods, or operations are called processes. A new process is usually the result of a discovery; a machine of invention. The arts of tanning, dyeing, making water-proof cloth, vulcanizing india-rubber, smelting ores, and numerous others, are usually carried on by processes as distinguished from machines. One may discover a new and useful improvement in the process of tanning, dyeing, &c., irrespective of any particular form of machinery or mechanical device. And another

may invent a labor-saving machine, by which the operation or process may be performed, and each may be entitled to his patent. As, for instance, A. has discovered that by exposing india-rubber to a certain degree of heat, in mixture or connection with certain metallic salts, he can produce a valuable product or manufacture: he is entitled to a patent for his discovery, as a process or improvement in the art irrespective of any machine or mechanical device. B., on the contrary, may invent a new furnace, or stove, or steam apparatus, by which this process may be carried on with much saving of labor and expense of fuel, and he will be entitled to a patent for his machine as an improvement in the art." 15 How. 252, 267.

Neilson's patent above referred to had some features very similar to those of Tilghman's. The strong objection urged against the latter is, that the particular apparatus described in the specification is not that which is generally used, and that it cannot be used with much profit or success in large manufacturing operations; whereas the slower method of dissolving fats in a common boiler, or digester, at a lower temperature even than that of melting bismuth, which is not described in the specification, is the one which is generally adopted. Precisely this circumstance existed in reference to the patent of Neilson. The specification directed that the blast or current of air produced by the blowing apparatus should be passed into an air-vessel or receptacle heated to a red heat, and from thence into the furnace. Then, after stating that the air-vessel or receptacle should be increased in size according to the size of the forge or furnace to be supplied, the specification adds: "The form or shape of the vessel or receptacle is immaterial to the effect, and may be adapted to the local circumstances or situation." Now, the most simple and natural form of an air-vessel, for heating the blast, as here directed, would be a box or chamber, or a cylindrical vessel; but it turned out in practice that a receptacle of this kind would answer the purpose but very imperfectly; and that the best and most useful method was to heat the blast in a series of tubes placed in a heated oven. This was held to be no ground for invalidating the patent, or for preventing it from covering intermediate tubes, as well as an intermediate box or chamber, the jury being of

opinion that a man of ordinary skill and knowledge in the construction of blowing and air-heating apparatus would be able, from the information contained in the specification, to erect a machine which would answer some beneficial purpose in the application of the process, and would not be misled and prevented from so doing by the declaration that the form or shape of the vessel or receptacle was immaterial to the effect. In this view of the subject the patent was sustained after very great consideration.

Some question has, indeed, been made whether Neilson's patent was sustained as a patent for a process. The Court of Exchequer, in reviewing the proceedings at the trial, and answering the objection that it was a patent for a principle, said: "It is very difficult to distinguish it from the specification of a patent for a principle, and this at first created in the minds of some of the court much difficulty; but, after full consideration, we think that the plaintiff does not merely claim a principle, but a machine embodying a principle, and a very valuable one. We think the case must be considered as if, the principle being well known, the plaintiff had first invented *a mode of applying it* by a mechanical apparatus to furnaces; and his invention consists in this, — *by interposing a receptacle for heated air between the blowing apparatus and the furnace.* In this receptacle he directs the air to be heated by the application of heat externally to the receptacle, and thus he accomplishes the object of applying the blast, which was before of cold air, in a heated state to the furnace." Web. P. C. 275, 371.

In this passage, we think that the Court of Exchequer (who spoke through Baron Parke) drew the true distinction between a mere principle, as the subject of a patent, and a process by which a principle is applied to effect a useful result. That a hot-blast is better than a cold-blast for smelting iron in a furnace was the principle or scientific fact discovered by Neilson; and yet, being nothing but a principle, he could not have a patent for that. But having invented and practically exemplified a process for utilizing this principle, namely, that of heating the blast, in a receptacle, between the blowing apparatus and the furnace, he was entitled to a patent for that process, although he did not distinctly point out all the forms of appara-

tus by which the process might be applied, — having, nevertheless, pointed out a particular apparatus for that purpose, and having thus shown that the process could be practically and usefully applied. Another person might invent a better apparatus for applying the process than that pointed out by Neilson, and might obtain a patent for such improved apparatus; but he could not use the process without a license from Neilson. His improved apparatus would, in this respect, stand in a relation to the process analogous to that which an improvement on a patented machine bears to the machine itself.

That Neilson's patent was regarded as for a process is apparent from what is said by the judges who had it under consideration. Thus Baron Parke at the trial had said: "The specification and patent together make it clear what the discovery was: it was the introduction of hot air by means of heating it before it was introduced into the furnace, between the blowing apparatus and the furnace." Web. P. C. 275, 312. And when the matter came before the House of Lords, after a trial in Scotland, Lord Campbell said: "After the construction first put upon it [the patent] by the learned judges of the Court of Exchequer, sanctioned by the high authority of my noble and learned friend now upon the woolsack, when presiding in the Court of Chancery, I think the patent must be taken to extend to all machines, of whatever construction, whereby the air is heated intermediately between the blowing apparatus and the blast furnace. That being so, the learned judge was perfectly justified in telling the jury that it was unnecessary for them to compare one apparatus with another, because, confessedly, that system of conduit pipes was a mode of heating air by an intermediate vessel between the blowing apparatus and the blast furnace, and, therefore, it was an infraction of the patent." Id. 715.

This case of the hot-blast was commented upon in the great case of *O'Reilly* v. *Morse*, and is there recognized and approved in the opinion of this court delivered by Chief Justice Taney. After quoting the remarks of Baron Parke in the Court of Exchequer, cited above, the Chief Justice says: "We see nothing in this opinion differing in any degree from the familiar principles of law applicable to patent cases. Neilson claimed

no particular mode of constructing the receptacle, or of heating it. He pointed out the manner in which it *might* be done; but admitted that it might also be done in a variety of ways, and at a higher or lower temperature; and that all of them would produce the effect in a greater or less degree, provided the air was heated by passing through a heated receptacle. . . . Whoever, therefore, used this method of throwing hot air into the furnace, used the process he had invented, and thereby infringed his patent, although the form of the receptacle or the mechanical arrangements for heating it might be different from those described by the patentee. For whatever form was adopted for the receptacle, or whatever mechanical arrangements were made for heating it, the effect would be produced in a greater or less degree, if the heated receptacle was placed between the blower and the furnace, and the current of air passed through it. . . . The patent was supported because he [Neilson] had invented a mechanical apparatus by which a current of hot air, instead of cold, could be thrown in. And this new method was protected by the patent. The interposition of a heated receptacle in any form was the novelty he invented." 15 How. 62, 115, 116.

We have quoted these remarks of the Chief Justice more fully because they show most clearly that he put the same construction upon Neilson's patent that was put upon it by Lord Campbell, and that he fully acquiesced in the legality and validity of a patent for a process. Yet it has been supposed that the decision in *O'Reilly* v. *Morse* was adverse to patents for mere processes. The mistake has undoubtedly arisen from confounding a patent for a process with a patent for a mere principle. We think that a careful examination of the judgment in that case will show that nothing adverse to patents for processes is contained in it. The eighth claim of Morse's patent was held to be invalid, because it was regarded by the court as being not for a process, but for a mere principle. It amounted to this, namely, a claim of the exclusive right to the use of electro-magnetism as a motive power for making intelligible marks at a distance; that is, a claim to the exclusive use of one of the powers of nature for a particular purpose. It was not a claim of any particular machinery, nor a claim of any particular

process for utilizing the power; but a claim of the power itself, — a claim put forward on the ground that the patentee was the first to discover that it *could* be thus employed. This claim the court held could not be sustained.

That this was the true ground of the decision will be manifest from the following observations of the Chief Justice in the opinion already quoted from. He says: "He [Morse] claims the exclusive right to every improvement where the motive power is the electric or galvanic current, and the result is the marking or printing intelligible characters, signs, or letters at a distance. If this claim can be maintained, it matters not by what *process* or *machinery* the result is accomplished. For aught that we now know, some future inventor, in the onward march of science, may discover a mode of writing or printing at a distance by means of the electric or galvanic current, without using any part of the process or combination set forth in the plaintiff's specification. . . . In fine, he claims an exclusive right to use a *manner and process* which he has not described, and indeed had not invented, and therefore could not describe when he obtained his patent. The court is of opinion that the claim is too broad, and not warranted by law. . . . It is the high praise of Professor Morse that he has been able by a new combination of known powers, of which electro-magnetism is one, to discover a method by which intelligible marks or signs may be printed at a distance. And for the method or process thus discovered he is entitled to a patent. But he has not discovered that the electro-magnetic current, used as a motive power, in any other method, and with any other combinations, will do as well." After reviewing the statutes and decisions bearing upon the subject, the Chief Justice makes a summary conclusion of the whole matter, as follows: "Whoever discovers that a certain useful result will be produced, in any art, machine, manufacture, or composition of matter, by the use of certain means, is entitled to a patent for it; provided he specifies the means he uses in a manner so full and exact that any one skilled in the science to which it appertains can, by using the means he specifies, without any addition to or subtraction from them, produce precisely the result he describes. And if this cannot be done by the means he describes, the pat-

ent is void. And if it can be done, then the patent confers on him the exclusive right to use the means he specifies to produce the result or effect he describes, and nothing more. And it makes no difference, in this respect, whether the effect is produced by chemical agency or combination; or by the application of discoveries or principles in natural philosophy, known or unknown before his invention; or by machinery acting altogether upon mechanical principles. In either case, he must describe *the manner or process* as above mentioned, and the end it accomplishes. And any one may lawfully accomplish the same end without infringing the patent, if he uses means substantially different from those described." Id. 119.

It seems to us that this clear and exact summary of the law affords the key to almost every case that can arise. "Whoever discovers that a certain useful result will be produced in any art by the use of certain means is entitled to a patent for it, provided he specifies the means." But everything turns on the force and meaning of the word "means." It is very certain that the means need not be a machine, or an apparatus; it may, as the court says, be a *process*. A machine is a thing. A process is an act, or a mode of acting. The one is visible to the eye, — an object of perpetual observation. The other is a conception of the mind, seen only by its effects when being executed or performed. Either may be the means of producing a useful result. The mixing of certain substances together, or the heating of a substance to a certain temperature, is a process. If the mode of doing it, or the apparatus in or by which it may be done, is sufficiently obvious to suggest itself to a person skilled in the particular art, it is enough, in the patent, to point out the process to be performed, without giving supererogatory directions as to the apparatus or method to be employed. If the mode of applying the process is not obvious, then a description of a particular mode by which it may be applied is sufficient. There is, then, a description of the process and of one practical mode in which it may be applied. Perhaps the process is susceptible of being applied in many modes and by the use of many forms of apparatus. The inventor is not bound to describe them all in order to secure to himself the exclusive right to the process, if he is really its inventor or dis-

coverer. But he must describe some particular mode, or some apparatus, by which the process can be applied with at least some beneficial result, in order to show that it is capable of being exhibited and performed in actual experience.

Let us apply these principles to the present case. In the first place, the claim of the patent is not for a mere principle. The chemical principle or scientific fact upon which it is founded is, that the elements of neutral fat require to be severally united with an atomic equivalent of water in order to separate from each other and become free. This chemical fact was not discovered by Tilghman. He only claims to have invented a particular mode of bringing about the desired chemical union between the fatty elements and water. He does not claim every mode of accomplishing this result. He does not claim the lime-saponification process, nor the sulphuric-acid distillation process, and if, as contended, the result was accomplished by Dubrunfaut, Wilson, and Scharling, by means of steam distillation, he does not claim that process. He only claims the process of subjecting to a high degree of heat a mixture continually kept up, of nearly equal quantities of fat and water in a convenient vessel strong enough to resist the effort of the mixture to convert itself into steam. This is most certainly a process. It is clearly pointed out in the specification, and one particular mode of applying it and carrying it into effect is described in detail. But it is not the particular apparatus described which Tilghman desires to secure by his patent. Having pointed out the process and suggested a particular mode of applying it, he claims as his invention "*the manufacturing of fat acids and glycerine from fatty bodies by the action of water at a high temperature and pressure.*" The true construction of this claim is to be sought by comparing it, as we have already done, with the context of the specification; with the statement of the patentee that his "invention consists of a *process* for producing free fat acids and solution of glycerine from those fatty and oily bodies of animal and vegetable origin, which contain glycerine as a base;" that "for this purpose he subjects these fatty and oily bodies to the action of water at a high temperature and pressure, so as to cause the elements of those bodies to combine with water and thereby obtain at the same time

free fat acids and solution of glycerine;" that he "mixes the fatty body to be operated upon with from a third to a half of its bulk of water, and the mixture may be placed in any convenient vessel in which it can be heated to the melting-point of lead" [which is afterwards explained to be only desirable for a quick result, not essential]; that "the vessel must be closed and of great strength, so that the requisite amount of pressure may be applied to prevent the conversion of the water into steam." This is the process which the patentee claims to have invented; and this description of it gives the proper construction and qualification to the claim.

It is objected that the particular apparatus described in the patent for carrying the process into effect cannot be operated to produce any useful result. We have examined the evidence on this point, and are satisfied that it shows the objection to be unfounded. A recapitulation of this evidence is not necessary. The testimony of Tilghman himself, of Professor Booth, and of Mr. Wilson is directly to the point.

It only remains that we should express our views on the question of infringement. The defendants advance several reasons for the purpose of showing that their process does not conflict with that of Tilghman. First, because they do not use the apparatus described in the complainant's patent; but use a boiler in which the charge of fat and other materials is placed and heated; and do not mix the fat and water in the manner pointed out in the specification of the patent, but, on the contrary, have inserted in the boiler a pump which forces the water as it settles to the bottom upwards to the top of the mass and pours it upon the upper surface, whence it again finds its way down through the fat, thus keeping up a constant mixture. It is unnecessary to add anything further on the subject of the form of the apparatus used. The patentee is not confined to a metallic coil of pipe heated in a furnace; but his patent extends to and embraces any convenient vessel for holding the mixture, which is strong enough to sustain the pressure necessary to prevent the water from being converted into steam. The defendants use such a vessel, and use it for the purpose indicated and pointed out in the patent. The vessel which they use has the requisite strength to prevent the water from

being converted into steam, and does effect that object. And as to the defendants' using a different method from that suggested in the patent for keeping up the mixture of fat and water, that is of no consequence. The keeping up of the mixture is the important thing. That is a necessary part of the process. They employ such a device for effecting this as is adapted to the form of vessel in which they heat the material. Using a boiler instead of a coil of pipe for this purpose, they are obliged to employ an additional or modified means for keeping up the mixture. They only employ such means as, in view of the change adopted in the form of the heating apparatus, and of the known appliances in use in analogous processes, would naturally suggest themselves to a mechanic skilled in the art. Or, if the mode of effecting the continued mixture adopted by the defendants should be deemed a new and useful improvement, they might perhaps have a patent for that peculiar device without being entitled to use Tilghman's process, on which it is but an improvement.

Another ground on which the defendants argue that they do not infringe the patent is, that they do not, in their process, use water alone in admixture with fat, but use also some portion of lime: that they formerly used seven per cent of lime, and now use four per cent. But they do not use lime in the manner and to the extent in which it is used for dissolving fats by the saponifying process. That requires twelve or fourteen per cent. Even if the saponifying process partly takes place, they use Tilghman's process for effecting the balance of the operation. They use water in admixture with fat, heated to a high degree, far above the boiling-point, and yet subjected to such pressure as to prevent the water from being converted into steam; and though they may also use other things at the same time, which other things may facilitate the operation, or render a less degree of heat necessary than would be required when water alone is used, and thus actually improve the process of Tilghman; yet this process is included in their operation, and forms the basis of it. It is idle, therefore, to say that they do not infringe Tilghman's patent. It is unnecessary to determine what precise part the lime used by the defendants plays in their process; whether, as the complainant

contends, it saponifies the fat to a certain extent, leaving the remainder to be acted upon by the water alone purely after the process of Tilghman; or whether, as the defendants contend, the lime produces a more perfect and active commixture of the fat and water, or predisposes the fat to unite with the requisite elements of water necessary for producing glycerine and the fat acids, — in either case the process of Tilghman, modified or unmodified by the supposed improvement, underlies the operation performed in the defendants' boilers.

Another ground assumed by the defendants to avoid the charge of infringement is, that they do not heat the mixed mass in the manner pointed out in Tilghman's specification; but, instead of heating the containing vessel by an outside application of heat, they heat the contents by the introduction of super-heated steam. But we think that this does not alter the essential character of the process. The heating by steam is clearly an equivalent method to that of heating by an external fire. The patent does not prescribe any particular method of applying the heat, except when using the pipe and coil apparatus described in the specification; and, even in the use of this apparatus, the outward application of the heat to the pipe is suggested incidentally and as a matter of convenience rather than as an essential requisite. The patentee showed one method in which the heat could be applied. That was all that was necessary for him to do. If it could be applied in any number of different methods, it would not affect the validity of the patent as a patent for a process. The method of heating the mixture by the introduction of steam may be attended with some beneficial results, in producing an agitation, or automatic circulation helpful to the perfection of the admixture of the water and fat; and so far it may be an improvement on heating from without. Suppose this to be so, as before said, the introduction of an improvement gives no title to use the primary invention upon which the improvement is based.

Finally, the defendants argue that they only use a low degree of heat and pressure compared with that pointed out by the patent, namely, only about 310° Fah. instead of 612°. The precise degree of heat, as we have seen, is not of the

essence of the patent. The specification only claims that a high degree of heat, such as would be sufficient to melt lead, is most effective and rapid in producing the desired result; but suggests a trial of the apparatus employed with different degrees of heat so as to ascertain that which is best for each particular kind of fat. "By starting the apparatus," the language is, "at a low heat, and gradually increasing it, the temperature giving products most suitable to the intended application of the fatty body employed can easily be determined." It is probably true, as contended for by the defendants, that by the use of a small portion of lime, the process can be performed with less heat than if none is used. It may be an improvement to use the lime for that purpose; but the process remains substantially the same. The patent cannot be evaded in that way. The matter may be stated thus: Tilghman discovers a process of decomposing fats by mixing them with water, and heating the mixture to a high temperature under a pressure that prevents the formation of steam. It is a new process, never known before. The defendants seeing the utility of the process, and believing that they can use a method somewhat similar without infringing Tilghman's patent, put a little lime into the mixture, and find that it helps the operation, and that they do not have to use so high a degree of heat as would otherwise be necessary. Still, the degree of heat required is very high, at least a hundred degrees above the boiling-point; and a strong boiler or vessel is used in order to restrain the water from rising into steam. Can a balder case be conceived of an attempted evasion and a real infringement of a patent?

And as to the low degree of heat used in the operations of the defendants, this must also be said: that, with the reduction of the temperature, the time of perfecting the operation is more than proportionally increased. Tilghman was aware of this result, and pointed it out in his patent. He expressly says: "The decomposing action of the water becomes more powerful as the heat is increased." What can be done in minutes by the application of a very high degree of heat, requires hours to do at the temperature used by the defendant. But the process is still the same, and the defendants fail to evade the patent.

We pass by the fact that the defendants first took a license from the patentee, and under it and under his directions erected substantially the same apparatus which they are yet using. Receiving what they regarded as additional light, they refused to continue the payment of a royalty, and put the complainant to his legal remedy.

It is our opinion that the patent is for a process, that it is a valid patent, and that the defendants infringe it.

We have considered the case entirely upon its merits. It is unnecessary to bestow much discussion upon the technical objections that have been raised. They have not been pressed in the argument, and are probably not seriously relied on. One of them is, that no replication was filed in the case. To this it may be answered, that the parties have throughout treated the case as though it were regularly at issue. The various stipulations into which they have entered, with regard to the admission of evidence to be heard on the trial of the cause, are totally inconsistent with the idea that the case was to be heard merely on bill and answer. Another objection is, that the patent was dated more than six months prior to the filing of the application for it. But under the law then in force (1854) with regard to the antedating of patents where a foreign patent had been obtained, this was admissible. The sixth section of the act of March 3, 1839, entitled "An Act in addition to an act to promote the progress of the useful arts," expressly declared "that no person shall be debarred from receiving a patent for any invention or discovery . . . by reason of the same having been patented in a foreign country more than six months prior to his application: *Provided*, that the same shall not have been introduced into public and common use in the United States prior to the application for such patent: *And provided also*, that in all cases every such patent shall be limited to the term of fourteen years from the date or publication of such foreign letters-patent." Now, we know by the proceedings on the application in this case that the attention of the Commissioner of Patents was expressly called to the fact of the issuing of the English patent, and that the question of the date of the patent in suit was submitted to and considered by him. Under the laws then in force, he

determined that the patent ought to be antedated as of the date of the English patent. It must be presumed that his decision was right according to the facts of the case, at least until the contrary is shown; and nothing has been shown to the contrary by any evidence in the cause to which our attention has been called.

The decree of the Circuit Court will be reversed, and the cause remanded with directions to enter a decree in conformity with this opinion; and it is

So ordered.

INDEX.

ACCOUNTING. See *Assignment*, 2; *Practice*, 9.

ACCOUNTS WITH THE UNITED STATES, SETTLEMENT OF See *Court of Claims*, 1; *Evidence*, 8.

ADMINISTRATOR. See *Evidence*, 10.

ADMIRALTY.

1. The courts of the United States, as courts of admiralty, have not exclusive jurisdiction of suits *in personam*, growing out of collisions between vessels while navigating the Ohio River. *Schoonmaker* v. *Gilmore*, 118.
2. A small schooner, having no watch on deck, was, in a very dark night, lying at anchor inside the Delaware Breakwater, when vessels were constantly arriving for shelter from an approaching storm. Among them was one well manned, which, in proceeding to a proper anchorage, without any fault of either omission or commission on her part, collided with and sunk the schooner. If a sufficient watch had been on the deck of the latter, the collision might have been avoided. *Held*, that the vessel was not liable. *The "Clara,"* 200.
3. At about ten o'clock in the forenoon, when the weather was clear and fine, a steamship and a schooner were on the ocean. The schooner, having seen the steamship when six or seven miles away, kept steadily on her course. The steamer saw the schooner when three miles off, and from that time until a collision between them occurred both vessels were sailing on courses which crossed each other, so as to involve risk of collision. *Held*, that under the circumstances it was the duty of the steamship to keep out of the way of the schooner, and the latter having held her course, the former is liable for the damages occasioned by the collision. *The "Benefactor,"* 214.
4. The ruling in *The Abbotsford* (98 U. S. 440), that under the act of Feb. 16, 1875 (18 Stat. 315), the finding of facts by the Circuit Court in admiralty cases is conclusive, and that only rulings upon questions of law can be reviewed by bill of exceptions, reaffirmed. *Id.*

ADVERSE POSSESSION. See *Vacant Lands, Entry upon, under Color of Title.*

AGENT. See *Bills of Exchange and Promissory Notes*, 3.

ALABAMA. See *Constitutional Law*, 11, 12; *Damages; Municipal Bonds*, 4–6.

AMENDMENT. See *Municipal Corporations*, 5, 6.

APPEAL.

1. An appeal will be dismissed when it appears from the record, taken as a whole, that the amount actually in controversy is not sufficient to give the court jurisdiction. *Banking Association* v. *Insurance Association*, 121.
2. *Gray* v. *Blanchard* (97 U. S. 564) reaffirmed. *Id.*
3. An appeal is the only mode by which the appellate jurisdiction of this court can be exercised in equity suits, brought in the courts of the United States, and it does not lie before a final decree has been rendered. *Hayes* v. *Fischer*, 121.
4. A proceeding in the court below for contempt cannot be re-examined here on an appeal or a writ of error. *Id.*
5. A bond is not sufficient for the purposes of either an appeal to this court or a *supersedeas*, if the obligors are not thereby bound for the payment of costs, should the appellant fail to make his plea good. *Seward* v. *Corneau*, 161.
6. The Circuit Court in a foreclosure suit appointed a receiver of the rents and profits of the mortgaged land, and ordered that all persons who had come into the possession thereof *pendente lite* should surrender it to him on his demand. On their refusal to do so, a writ was issued commanding the marshal to eject them. They thereupon addressed a petition to one of the judges, praying that the writ be revoked by the court. *Held*, that an appeal does not lie from his order at chambers, denying the petition. *Hentig* v. *Page*, 219.
7. Where no security having been taken at the time of entering an order allowing an appeal from a decree passed by the Supreme Court of the District of Columbia sitting in general term, the appellant, within the time limited by statute, filed with the clerk a bond with sureties, conditioned according to law, and approved by a judge of that court, by whom, on the same day, a citation was signed, — *Held*, that the power of the judge over the appeal and the security was thereupon, in the absence of fraud, exhausted, and that the control of the *supersedeas* as well as of the appeal was transferred to this court. *Draper* v. *Davis*, 370.

ARGOLS OR CRUDE TARTAR. See *Customs Duties*, 1.

ASSIGNEE IN BANKRUPTCY. See *Bankruptcy; Stock, Subscription to.*

Where a bankrupt has fraudulently conveyed his property, his assignees in bankruptcy are the only parties to sue for and subject it to the payment of his debts. *Trimble* v. *Woodhead*, 647.

ASSIGNMENT. See *Claims against the United States; Set-off.*

1. The assignment of a judgment, and of all bonds and instruments which, during the progress of the suit wherein it was rendered, were

ASSIGNMENT (*continued*).
taken in connection therewith, transfers to the assignee a bond given by the defendant with surety, whereby he secured the release of his property which had been seized under an attachment issued in the suit. *George* v. *Tait*, 564.
2. A. assigned to the amount of a certain loan his interest in a policy of insurance upon his life to B., his creditor. The latter agreed in writing to make such a settlement with A.'s representatives as the case may require, should he, in the event of A.'s death before the payment of the money, receive from the insurance company the amount due on the policy. Other similar assignments were from time to time made. The last assignment imports an absolute transfer to B. of all A.'s right, title, and interest in the policy and to the payments previously made therefor, and all benefit and advantage to be derived therefrom. Upon consideration of the evidence, — *Held*, that the assignment must be construed as appointing B., upon the death of A., to receive from the company such sum as would then be due on the policy, and after reimbursing himself to the extent of his loans to A., to pay the balance to the persons entitled thereto. *Page* v. *Burnstine*, 664.

ATTORNEY AND CLIENT. See *Bankruptcy*, 1.

BACK-TAX COLLECTOR. See *Municipal Corporations*, 5, 6.

BAD FAITH.
A party who, before its maturity and for a valuable consideration, purchases mercantile paper from the apparent owner thereof acquires a right thereto which can only be defeated by proof of bad faith or of actual notice of such facts as impeach the validity of the transaction. *Swift* v. *Smith*, 442.

BAILMENT. See *Personal Chattels, Sale and Delivery of*, 2.

BANKRUPTCY. See *Assignee in Bankruptcy; National Banks.*
1. A., as attorney for B., procured a judgment by default in favor of the latter against C., of whose insolvency and intent to commit a fraud on the bankrupt law he had knowledge. *Held*, that that knowledge was imputable to B. *Rogers* v. *Palmer*, 263.
2. C. having, with intent to give a preference to B., contributed to the rendition of the judgment at an earlier day than without his aid it could have been rendered, an execution was sued out and levied upon his goods. *Held*, that he thereby procured them to be taken on legal process within the meaning of the thirty-fifth section of the Bankrupt Law of March 2, 1867 (14 Stat. 534), as modified by the act of June 22, 1874. 18 Stat., part 3, pp. 180, 181. *Id.*
3. A., by his bond, acknowledged the receipt from an insurance company of ten shares of its capital stock, and agreed to pay $200 therefor, in instalments, — one-fourth on the receipt of the stock certificate, and the remainder in three equal amounts at three, six, and nine months from Jan. 7, 1871, the date of the bond. He paid on executing

BANKRUPTCY (*continued*).

it $25, and his name was entered as a stockholder on the books of the company. The certificate was not delivered or demanded. In 1872 the company became bankrupt. *Held*, that the assignee is entitled to recover of A. the unpaid instalments. *Hawley* v. *Upton*, 314.

4. A bill, filed by the assignee in bankruptcy of an insurance company against its former officers and directors, alleges that they had divided among themselves and friends certain bonds belonging to it, and prays for an accounting and relief. It appears from the proofs that the bonds were never the property of the company, but were, without consideration, borrowed, by some of its officers, for the fraudulent purpose of exhibiting them, as part of its assets, to the official examiners, thus furnishing evidence of its sound condition, and were afterwards returned, according to agreement, to their real owners. *Held*, that the bill was properly dismissed. *Walker* v. *Reister*, 467.
5. A., with a view of giving preference to B., a creditor, transferred to him, Nov. 15, 1873, certain securities. B. accepted them with knowledge that A. was insolvent. Proceedings in bankruptcy were instituted against A. Feb. 7, 1874, and he was declared to be a bankrupt. His assignee brought suit in June, 1875, against B. for the value of the securities. *Held*, that he was entitled to recover. *Auffm'ordt* v. *Rasin*, 620.
6. The tenth section of the act of June 22, 1874 (18 Stat., part 3, 178), whereby, in cases of involuntary or compulsory bankruptcy, the period of four months mentioned in sect. 35 of the Bankrupt Act of March 2, 1867 (14 id. 534), was changed to two months, did not take effect until two months after its passage. It was not intended to destroy previously vested rights of property or of action, nor was it in the nature of a statute of limitations. It merely declared that certain acts thereafter committed, more than two months prior to the institution of proceedings in bankruptcy, should be valid. *Id.*
7. Where the marshal of the United States to whom was directed a warrant of provisional seizure sued out of the proper court sitting in bankruptcy, levied it upon certain goods in the possession of a third party claiming title to them, — *Held*, that they were subject to seizure under the warrant, if they were the property of the person against whom the proceeding in bankruptcy was pending. *Sharpe* v. *Doyle*, 686.
8. The marshal must, in such a case, act at his own risk in regard to the ownership of them and their liability to seizure. *Id.*

BILL OF EXCEPTIONS. See *Exceptions, Bill of.*

BILLS OF EXCHANGE AND PROMISSORY NOTES. See *Judgment; Lien.*

1. The transfer by indorsement to a creditor of negotiable paper before maturity, merely as security for an antecedent debt, although it is without his express agreement for indulgence, is not an improper

BILLS OF EXCHANGE, &c. (*continued*).

use of such paper, and is as much in the usual course of commercial business as its transfer in payment of the debt. In neither case is the *bona fide* holder affected by equities or defences between prior parties of which he had no notice. *Railroad Company* v. *National Bank*, 14.

2. A party who, before its maturity and for a valuable consideration, purchases mercantile paper from the apparent owner thereof acquires a right thereto which can only be defeated by proof of bad faith or of actual notice of such facts as impeach the validity of the transaction. *Swift* v. *Smith*, 442.

3. Suit by A. against B. as indorser of a protested draft, the indorsement reading, "Pay to A. or order for account of B." The declaration contained a special count on the draft and indorsement, and one for money paid for the use of B. at his request. *Held*, 1. That by the terms of the indorsement A. became merely the agent of B. for the collection of the money. 2. That under the special count parol evidence was not admissible to vary those terms. 3. That under the common count it was competent for A. to show that at the time of the indorsement and delivery of the draft to him he gave B. his check therefor less the discount, and that the latter received and used the money. 4. That under that count A. was entitled to recover from B. either for money paid without consideration, money loaned, or money advanced to him on the faith of the delivery of the draft. *White* v. *National Bank*, 658.

BOND. See *Assignment*, 1; *Contracts*, 5, 6; *Evidence*, 9; *Municipal Bonds*; *Set-off*.

A bond is not sufficient for the purposes of either an appeal to this court or a *supersedeas*, if the obligors are not thereby bound for the payment of costs should the appellant fail to make his plea good. *Seward* v. *Corneau*, 161.

BOUNDARY, PRIVATE. See *Deceased Persons, Declarations of*.

BRIBERY.

A party who bribes an officer of the United States with money cannot maintain an action to recover it. *Clark* v. *United States*, 322.

CALIFORNIA. See *School Lands*.

CAPITATION TAXES. See *Constitutional Law*, 9.

CARRIER OF PASSENGERS. See *Passengers, Carrier of*.

CASES EXPLAINED, QUALIFIED, OR OVERRULED.

Erwin *v.* United States, 97 U. S. 392. *See* Goodman *v.* Niblack, 556.

Harkness *v.* Hyde, 98 U. S. 476. *See* Langford *v.* Monteith, 145.

Mitchell *v.* Tilghman, 19 Wall. 287. *See* Tilghman *v.* Proctor, 707.

O'Reilly *v.* Morse, 15 How. 62. *See* Id.

Sherman *v.* Buick, 93 U. S. 209. *See* Mining Company *v.* Consolidated Mining Company, 167.

CASES EXPLAINED, &c. (*continued*).
Spofford *v.* Kirk, 97 U. S. 484. *See* Goodman *v.* Niblack, 556.
Water & Mining Company *v.* Bugbey, 96 U. S. 165. *See* Mining Company *v.* Consolidated Mining Company, 167.

CAUSES, REMOVAL OF.
1. A petition for a *mandamus* was filed in one of her courts by the State of Mississippi to compel a railroad company, a corporation existing under the laws of that State, to remove a stationary bridge which it had erected over Pearl River, a navigable stream on the line between Louisiana and Mississippi. Thereupon the company presented its petition, duly verified, praying for the removal of the suit into the Circuit Court of the United States, and alleging that the right to erect, use, and maintain the bridge was vested by the company's charter; that its maintenance over said river was authorized by the act of Congress approved March 2, 1868 (15 Stat. 38); that thereunder it became a part of a post-road over which for several years the mails of the United States have been carried, and that therefore the suit impugns the rights, privileges, and franchises granted by said act. The petition was accompanied by a bond with good and sufficient security, conditioned as required by the act of March 3, 1875. 18 Stat., part 3, p. 471. *Held*, that under the latter act the company was entitled to the removal prayed for. *Railroad Company* v. *Mississippi*, 135.
2. The decisions of this court affirming the jurisdiction of the courts of the United States in cases arising under the laws of the United States, or where a State is a party, cited and commented on. *Id.*
3. The ruling in *Insurance Company* v. *Dunn* (19 Wall. 214) and *Removal Cases* (100 U. S. 457), that a party loses none of his rights who, after failing to obtain its removal, contests a suit on its merits in the State court, reaffirmed. *Id.*
4. Where the Supreme Court of a State reversed, on appeal, a decree dismissing, upon a final hearing, the complainant's bill, and remanded the cause with instructions to refer it to a master to state the accounts between the parties in accordance with the mandate, the suit cannot be removed to the Circuit Court of the United States. *Jifkins* v. *Sweetzer*, 177.
5. *Removal Cases* (100 U. S. 457) cited and approved. *Id.*
6. An action pending in a State court cannot be removed to the Circuit Court, by written stipulation, where there is nothing in the latter or the record to show that, by reason of the subject-matter, or the character of the parties, the latter court can take cognizance of it. *People's Bank* v. *Calhoun*, 256.
7. In a foreclosure suit, the Circuit Court, having jurisdiction of the subject-matter and the parties, appointed a receiver, who, pursuant to its orders, took possession of the mortgaged road. In an action between other parties, subsequently brought in a State court, an attachment was sued out and levied upon the road. Pending an application thereupon made to the Circuit Court, to restrain the

CAUSES, REMOVAL OF (*continued*).
plaintiff from further proceeding with his attachment, he and the defendant to the action consented to its removal to the Circuit Court, where, upon a finding that the road was not, at the date of the levy of the attachment, the property of that defendant, the writ was dismissed. *Held*, that the Circuit Court had the right to determine upon the conflicting claims to the possession of the road, and that the parties to the action, by consenting to transfer it, did no more, in effect, than that court might have compelled them to do. *Id.*

CHARTER. See *Causes, Removal of*, 1; *Municipal Bonds*, 13.

CHARTER, REPEAL OF. See *Municipal Corporations.*

CHATTELS. See *Personal Chattels, Sale and Delivery of.*

CITY, LIABILITY OF, TO REFUND MONEY PAID INTO HER TREASURY. See *Municipal Bonds*, 10–12.

CLAIMS AGAINST THE UNITED STATES. See *Court of Claims.*
1. A., who had a contract with the United States, agreed with B., in 1847, that the latter should perform it, and that the profits should be equally divided between them. Thereupon they and C. executed an instrument in which the agreement was recited, and A., for the due fulfilment thereof, assigned the contract to C. as trustee. A controversy having arisen as to the amount due upon the contract, Congress, in 1870, authorized C. as such trustee to sue the United States therefor, and subsequently made an appropriation to pay the judgment which he recovered. *Held*, that as the assignment was thus recognized by the government, the parties to the agreement and those claiming under them are precluded from setting up that the contract was not assignable. *Goodman* v. *Niblack*, 556.
2. A. made in 1860 an assignment for the benefit of his creditors, which included all his rights, credits, effects, and property of every description. *Held*, that the assignment, although it covered whatever might be due to him under his contract with the government, was not within the prohibition of the act of Feb. 26, 1853 (10 Stat. 170, re-enacted in sect. 3477, Rev. Stat.), nor in violation of public policy. *Id.*
3. *Spofford* v. *Kirk* (97 U. S. 484) and *Erwin* v. *United States* (id. 392) cited and examined. *Id.*

COLLATERAL SECURITY. See *Bills of Exchange and Promissory Notes*, 1, 3; *Deed of Trust.*

COLLECTOR OF CUSTOMS. See *Foreign Coins, Value of.*

COLLECTOR OF INTERNAL REVENUE. See *Income Tax*, 2.

COLLISION. See *Admiralty*, 1–3.

COLOR OF TITLE. See *Title; Vacant Lands, Entry upon, under Color of Title.*

COMITY.

The courts of the United States are not controlled by the decisions of State courts on questions of general commercial law. *Swift* v. *Tyson* (16 Pet. 1) and *Oates* v. *National Bank* (100 U. S. 239) reaffirmed. *Railroad Company* v. *National Bank*, 14.

COMMERCE.

1. An act of the legislature of Texas, entitled "An Act regulating taxation," approved June 8, 1873, provides in its third section that "there shall be levied on and collected from every firm or association of persons . . . pursuing the occupation of selling spirituous, vinous, malt, and other intoxicating liquors in quantities less than one quart, $200; in quantities of a quart and less than ten gallons, $100; provided that this section shall not be so construed as to include any wines or beer manufactured in this State." A., who was pursuing, in that State, "the occupation of selling spirituous, vinous, malt, and other intoxicating liquors in quantities less than one quart," filed his petition, setting forth than the wines and beer which he was selling were the manufacture, not of that State, but of other States and of foreign nations, and praying that the county treasurer be enjoined from collecting the tax imposed by said act of 1873, on the ground of its repugnance to the Constitution of the United States. *Held*, that, as he was also engaged in selling other liquors, the injunction was properly refused. *Tiernan* v. *Rinker*, 123.
2. That act is inoperative only so far as it discriminates against imported wines or beer. A person cannot, for selling either of them, be subjected to a higher tax than that imposed for selling wines or beer manufactured in the State. *Id.*
3. While navigating the high seas between ports of the same State, a vessel of the United States is, together with the business in which she is engaged, subject to the regulating power of Congress. *Lord* v. *Steamship Company*, 541.
4. The power conferred upon Congress by the commerce clause of the Constitution is exclusive, so far as it relates to matters within its purview which are national in their character, and admit or require uniformity of regulation affecting all the States. That clause was adopted in order to secure such uniformity against discriminating State legislation. *County of Mobile* v. *Kimball*, 691.
5. Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. To regulate it, as thus defined, there must be only one system of rules applicable alike to the whole country, which Congress alone can prescribe. *Id.*
6. State legislation is not forbidden touching matters either local in their nature or operation, or intended to be mere aids to commerce, for which special regulations can more effectually provide, such as

COMMERCE (*continued*).
harbor pilotage, beacons, buoys, and the improvement of harbors, bays, and navigable rivers within a State, if their free navigation under the laws of the United States be not thereby impaired. Congress, by its non-action in such matters, virtually declares that, for the time being and until it deems fit to act, they may be controlled by State authority. The act of the State of Alabama, entitled "An Act to provide for the improvement of the river, bay, and harbor of Mobile," approved Feb. 16, 1867, is, therefore, not in conflict with the Constitution. *Id.*

COMMERCIAL PAPER. See *Bills of Exchange and Promissory Notes.*

COMMERCIAL LAW. See *Comity.*

COMMISSIONER OF PATENTS.
The ruling in *Seymour* v. *Osborne* (11 Wall. 516) and *Russell* v. *Dodge* (93 U. S. 460), touching the authority of the Commissioner of Patents in granting a reissue of letters-patent, reaffirmed. *Ball* v. *Langles*, 128.

COMPENSATORY DAMAGES. See *Passengers, Carrier of*, 3, 4.

COMPTROLLER OF THE CURRENCY. See *Stockholders of an Insolvent National Bank, Liability of*, 1.

CONDITIONAL SALE. See *Personal Chattels, Sale and Delivery of*, 2.

CONDITION PRECEDENT. See *Municipal Bonds*, 1.
The charter of A., a mutual life insurance company, provides that "every person who shall become a member of the corporation, by effecting insurance therein, shall, the first time he effects insurance and before he receives his policy, pay the rates that shall be fixed upon and determined by the trustees." In August, 1872, C., A.'s agent, received from B. an application for a policy upon his life for $6,000, duly made out upon a printed form furnished previously by C. A policy was issued by A., August 24, and forwarded to C. It contains a proviso that it shall "not take effect and become binding on the company until the premium be actually paid, during the lifetime of the person whose life is assured, to the company or to some person authorized to receive it, who shall countersign the policy on receipt of the premium." The premium to be paid by B. amounted to $302.52. The policy not having been called for, C. returned it, October 2, to A., and it was thereupon cancelled. Nothing beyond the delivery of the application to C. was done by B., or by any one in his behalf. He died September 4. His administrator tendered the first premium to C., who declined to act in the matter. Thereupon he transmitted the proofs of B.'s death to A., and on the refusal of the latter to accept the premium and deliver the policy brought this suit against A. *Held*, that the suit cannot be maintained, the payment of the premium in the lifetime of B. being a condition precedent to A.'s liability. *Giddings* v. *Insurance Company*, 108.

CONFISCATION.

1. A.'s lands in Louisiana were, May 6, 1865, duly forfeited to the United States by a decree of the proper court in the exercise of the jurisdiction conferred by the Confiscation Act of July 17, 1862 (12 Stat. 589), as modified by the joint resolution of even date therewith. Id. 627. A. purchased them under the decree, and, on receiving from the marshal a deed therefor, bargained and sold them to B. in fee, by an authentic act of sale, with all legal warranties. On the death of A., his heirs-at-law sued B. for the possession of the lands. *Held*, that they were entitled to recover. *French* v. *Wade*, 132.
2. *Wallach et al.* v. *Van Riswick* (92 U. S. 202) reaffirmed. *Id.*

CONSTITUTIONAL LAW. See *Causes, Removal of*, 1; *Commerce*, 3–6, *Contracts*, 5, 6; *Lands sold for the Non-payment of Taxes*, 2.

1. The act of the legislature of Texas, entitled "An Act regulating taxation," approved June 3, 1873, which provides in its third section that "there shall be levied on and collected from every firm or association of persons . . . pursuing the occupation of selling spirituous, vinous, malt, and other intoxicating liquors in quantities less than one quart, $200; in quantities of a quart and less than ten gallons, $100; provided that this section shall not be so construed as to include any wines or beer manufactured in this State," is inoperative only so far as it discriminates against imported wines or beer. A person cannot, for selling either of them, be subjected to a higher tax than that imposed for selling wines or beer manufactured in the State. *Tiernan* v. *Rinker*, 123.
2. The second section of the act of the General Assembly of Iowa, entitled "An Act in relation to riparian owners on the Mississippi and Missouri Rivers," approved March 18, 1874, is not in conflict with any statute of the United States. Where, therefore, the owner of lands on the Mississippi had made an embankment in front of them, and at its outer end beyond low-water mark erected, without the direction or consent of the Secretary of War, a stone pier or crib, this court affirms the judgment of the Supreme Court of that State, declaring that under that section a railway company cannot construct its road over the embankment between high and low water mark, unless the damages to such owner shall first be ascertained and paid. *Railway Company* v. *Renwick*, 180.
3. The obligation of contracts is impaired by such legislation as lessens the efficacy of the remedy which the law in force at the time they were made provided for enforcing them. *Louisiana* v. *New Orleans*, 203.
4. A. recovered judgment, in 1874, against New Orleans, upon certain bonds issued by the city in 1854, and sued out an execution, which was returned *nulla bona*. The Act No. 5 of the legislature of Louisiana of 1870 requires that a plaintiff, having an executory judgment against the city, must file a certified copy thereof in the office of the controller, and imposes upon the latter the duty of

CONSTITUTIONAL LAW (*continued*).
causing the same to be registered, and of issuing a warrant upon the treasurer for the amount due thereon, without any specific appropriation therefor, &c. *Held*, that so much of said act as requires such filing and registration before A. can procure a warrant in his favor for the amount due, or resort to other means to enforce the payment thereof, does not render less effective his pre-existing remedies, and is therefore not in conflict with the contract clause of the Constitution. *Id.*

5. The provision of the act of March 3, 1863 (12 Stat. 765; Rev. Stat., sects. 1059–1061), authorizing the Court of Claims, without the intervention of a jury, to hear and determine claims against the government, and also any set-off, counter-claim, claim for damages, or other demand on the part of the government against the claimant, does not violate the Seventh Amendment of the Constitution. *McElrath* v. *United States*, 426.
6. Sect. 4283 of the Revised Statutes, as limited in its application by sect. 4289, is not unconstitutional. *Lord* v. *Steamship Company*, 541.
7. The pilot laws of the State of New York are not in conflict with the Constitution of the United States. *Ex parte McNiel* (13 Wall. 236) and *Cooley* v. *Board of Wardens of Port of Philadelphia* (12 How. 299) cited and reaffirmed. *Wilson* v. *McNamee*, 572.
8. Congress, in the exercise of its power "to lay and collect taxes, duties, imposts, and excises," may, to enforce their payment, authorize the distraint and sale of either real or personal property. The owner of the property so distrained and sold is not thereby deprived of it without due process of law. *Springer* v. *United States*, 586.
9. Direct taxes, within the meaning of the Constitution, are only capitation taxes as expressed in that instrument, and taxes on real estate. *Id.*
10. The duty which the internal revenue acts provided should be assessed, collected, and paid upon gains, profits, and incomes was an excise or duty, and not a direct tax, within the meaning of the Constitution. *Id.*
11. The act of the State of Alabama, entitled "An Act to provide for the improvement of the river, bay, and harbor of Mobile," approved Feb. 16, 1867, is not in conflict with the Constitution of the United States. *County of Mobile* v. *Kimball*, 691.
12. The provision in that act for issuing county bonds by the president and commissioners of revenue of Mobile County is not a taking of private property for public use, within the meaning of the Constitution of Alabama, nor can it be declared invalid, although it may impose upon one county the expense of an improvement in which the whole State is interested. *Id.*

CONSTRUCTIVE SEISIN. See *Vacant Lands, Entry upon, under Color of Title.*

CONTEMPT, PROCEEDING FOR.

A proceeding in the court below for contempt cannot be re-examined here on an appeal or a writ of error. *Hayes* v. *Fischer*, 121.

CONTRACTS. See *Claims against the United States; Damages; Evidence*, 1; *Personal Chattels, Sale and Delivery of*, 2.

1. A., being indebted to B., proposed, in consideration of a further loan of money, to deliver, in payment of both sums, a certain quantity of wood at a stipulated price per cord. B. accepted the proposal, C. agreeing to receive the wood from him at that price. The loan was made, and A., pursuant to the agreement of the parties, delivered the wood upon the premises of C. *Held*, that A.'s title passed by that delivery, and that the wood was not subject to levy under executions thereafter issued by his creditors. *National Bank* v. *Dayton*, 59.
2. The conduct of one party to a contract which prevents the other from performing his part is an excuse for non-performance. *United States* v. *Peck*, 64.
3. By the law of Louisiana, a party to a synallagmatic contract has no right to rescind it by reason of the failure of performance by the other party, unless he returns to the latter what was received from him, so as to put him in the same situation in which he was before. *Gay* v. *Alter*, 79.
4. The obligation of contracts is impaired by such legislation as lessens the efficacy of the remedy which the law in force at the time they were made provided for enforcing them. *Louisiana* v. *New Orleans*, 203.
5. In the adjustment of her debt by the State of Virginia, her bonds, payable to order or bearer, with coupons annexed to them payable to bearer, were issued under the act of March 30, 1871, known as the "Funding Act," which declares that the coupons "shall be receivable at and after maturity for all taxes, debts, dues, and demands due the State," and that this shall be expressed on their face. Where, therefore, a creditor took, as in that act provided, such bonds for two-thirds of the amount of the old bonds he surrendered, and a certificate for the balance, a contract was consummated between the State and the holder of the bonds and the holder of the coupons, from which, without their consent, she could not be released. *Hartman* v. *Greenhow*, 672.
6. A subsequent enactment requiring the tax on the bonds issued under that act to be deducted from the coupons originally attached to them, when tendered in payment of taxes or other dues to the State, cannot be applied to coupons separated from the bonds, and held by a different owner, without impairing the contract. Such an owner is therefore entitled to a *mandamus* to compel the proper officer to receive for their full amount the coupons so tendered. *Id.*

CORPORATIONS. See *Municipal Corporations.*

1. Where a corporation, solvent at the time, and having no actual intent to defraud creditors, disposes of its lands for an inadequate

CORPORATIONS (*continued*).
consideration or by a voluntary conveyance, its subsequent creditors cannot question the transaction. *Graham* v. *Railroad Company*, 148.
2. *Semble*, that where a corporation has waived, or omitted to exercise, the right to institute proceedings to recover lands of which it has been defrauded, such right does not inure to the benefit of subsequent creditors or purchasers. *Id.*

COSTS. See *Public Money, Person accountable for*, 2.
1. A patentee is not, in an action for an infringement of his letters-patent, entitled to reimbursement for expenses incurred by him other than his taxable costs. *Parks* v. *Booth*, 96.
2. A bond is not sufficient for the purposes of either an appeal to this court or a *supersedeas*, if the obligors are not thereby bound for the payment of costs, should the appellant fail to make his plea good. *Seward* v. *Corneau*, 161.

COUNSEL FEES.
A patentee is not, in an action for an infringement of his letters-patent, entitled to reimbursement for counsel fees paid by him. *Parks* v. *Booth*, 96.

COUNTER-CLAIM. See *Court of Claims*, 2.

COURT AND JURY.
1. Neither the charge of the court below, if no exception was taken thereto before the final submission of the case to the jury, nor the granting or the refusing a new trial, is subject to review here. *Railway Company* v. *Heck*, 120.
2. Certain articles were imported by A. from Liverpool, Nov. 14, 1871, upon which the collector of the port of New York exacted the duty of six cents per pound, imposed by sect. 5 of the act of July 14, 1862 (12 Stat. 547), upon "argols or crude tartar." A. claimed that they were "argols crude," and, as such, were, by sect. 22 of the act of July 14, 1870 (16 id. 266), exempt from duty. A. paid the duty under protest, and brought suit against the collector to recover it. The court instructed the jury that it was for them to determine from the evidence whether the argols in question were "argols crude," then known as such to commerce or to science, or whether they were argols that were more or less refined. *Held*, that the instruction was proper, and covered the entire ground of the controversy. *Recknagel* v. *Murphy*, 197.
3. Where, before the final submission of the case to the jury, irrelevant evidence, which had been admitted, was withdrawn, and they were instructed to disregard it, — *Held*, that an exception to the action of the court will not be sustained, the presumption being, so far as this court is concerned, that, under such circumstances, the jury based their verdict upon legal evidence only. *Pennsylvania Company* v. *Roy*, 451.

COURT OF CLAIMS.

1. Upon the settlement of his accounts by the accounting officers of the treasury, B., while announcing that he would not be concluded thereby, and protesting that the allowance was insufficient, received it, and brought suit in the Court of Claims to recover the balance claimed. *Held*, that the United States is not bound by the settlement, but for any moneys improperly paid him in pursuance thereof is entitled to judgment. *McElrath* v. *United States*, 426.
2. The provision of the act of March 3, 1863 (12 Stat. 765 ; Rev. Stat., sects. 1059–1061), authorizing that court, without the intervention of a jury, to hear and determine claims against the government, and also any set-off, counter-claim, claim for damages, or other demand on the part of the government against the claimant, does not violate the Seventh Amendment of the Constitution. *Id.*

COURTS OF THE UNITED STATES. See *Comity; Jurisdiction*, 13, 14.

COVENANT TO RECONVEY.

Where a party, on receiving an absolute deed, covenants with his grantor to reconvey the lands, when the money which it was given to secure shall be paid, both instruments must be taken together as constituting a mortgage. *Lanahan* v. *Sears*, 318.

CREDITORS. See *Contracts*, 5, 6 ; *Corporations*.

CRIMINAL LAW. See *Estoppel*, 5.

Quære, whether the only mode for the recovery of the penalty prescribed by sect. 3296 of the Revised Statutes is not by indictment. *United States* v. *Chouteau*, 603.

CRUDE TARTAR. See *Customs Duties*, 1.

CUSTOMS DUTIES. See *Foreign Coins, Value of.*

1. Certain articles were imported by A. from Liverpool, Nov. 14, 1871, upon which the collector of the port of New York exacted the duty of six cents per pound, imposed by sect. 5 of the act of July 14, 1862 (12 Stat. 547), upon "argols or crude tartar." A. claimed that they were "argols crude," and, as such, were, by sect. 22 of the act of July 14, 1870 (16 id. 266), exempt from duty. A. paid the duty under protest, and brought suit against the collector to recover it. The court instructed the jury that it was for them to determine from the evidence whether the argols in question were "argols crude," then known as such to commerce or to science, or whether they were argols that were more or less refined. *Held*, that the instruction was proper, and covered the entire ground of the controversy. *Recknagel* v. *Murphy*, 197.
2. Imported goods composed of cotton and silk, the latter being the component part of chief value, were, by the act of June 30, 1864 (13 Stat. 202), subject to a duty of fifty per cent *ad valorem*. *Solomon* v. *Arthur*, 208.

DAMAGES. See *Constitutional Law*, 2; *Court of Claims*, 2; *Land, Liability of Owner of; Passengers, Carrier of*, 4.

Where, by an act of the State of Alabama of Feb. 16, 1867, entitled "An Act for the improvement of the river, harbor, and bay of Mobile," a harbor board was created and authorized to provide for the contemplated improvement by entering into a contract therefor binding upon the county, payment for the work to be made in the bonds of the county at a stipulated rate, — *Held*, that if specific performance cannot for any reason be enforced in favor of the party who is thereunto entitled, on his completion of the work under the contract, a court of equity will adjudge that compensation in damages be made to him by the county. *County of Mobile* v. *Kimball*, 691.

DECEASED PERSONS, DECLARATIONS OF.

In questions of private boundary, the declaration of a deceased person of particular facts, as distinguished from reputation, is not admissible unless it be shown that he had knowledge of that whereof he spoke, and was then on the land, or in possession of it, and was pointing out and marking the boundary, or discharging some duty in relation thereto. A declaration, merely reciting something past, is within the rule which excludes hearsay evidence. *Hunnicutt* v. *Peyton*, 333.

DECREE. See *Practice*, 9.

DECREE, BILL TO SET ASIDE A. See *Pleading*, 1.

DEED. See *Confiscation*, 1; *Deed of Trust; Mortgage*, 2.

DEED, DISAFFIRMANCE OF.

1. An infant *feme covert*, to whom lands in Indiana were conveyed, executed with her husband, May 20, 1847, a deed in fee therefor, for a valuable consideration paid by the grantee to him. She was, on her petition, divorced from him, Feb. 14, 1870. Within less than two months thereafter she gave due notice of her disaffirmance of the deed, and demanded possession of the lands, which was refused. She thereupon brought suit. *Held*, that, as she did nothing during her coverture to confirm the deed, her notice and suit avoided it. *Sims* v. *Everhardt*, 300.
2. An estoppel *in pais* not being applicable to an infant, she was not estopped from alleging her infancy, by any declaration which, at the time of executing the deed, she made in regard to her age. *Id.*

DEED OF TRUST. See *Lien; Mortgaged Lands in Illinois, Redemption of; Personal Chattels, Sale and Delivery of.*

Where a deed of trust of lands to secure a promissory note was released by the trustee without the surrender or payment of the note or the express authority of the holder thereof, a subsequent purchaser with notice takes them subject to the equitable rights of such holder. *Insurance Company* v. *Eldredge*, 545.

DELIVERY. See *Contracts*, 1.

DEMURRER. See *Jurisdiction*, 12.

DIRECT TAXES.

1. Direct taxes, within the meaning of the Constitution, are only capitation taxes as expressed in that instrument, and taxes on real estate. *Springer* v. *United States*, 586.
2. The duty which the internal revenue act of June 30, 1864 (13 Stat. 218), as amended by the act of March 3, 1865 (id. 469), provided should be assessed, collected, and paid upon gains, profits, and incomes was an excise or duty, and not a direct tax, within the meaning of the Constitution. *Id.*

DISSEISIN. See *Vacant Lands, Entry upon, under Color of Title.*

DISTILLER. See *Estoppel*, 5.

While the act of July 28, 1868 (15 Stat. 125), was in force, A., the owner of two distilleries, applied to the Commissioner of Internal Revenue for Tice meters for them, and deposited the price with the collector of the proper district to be paid to the manufacturer. The latter delivered them and received the money. In one distillery the meters were not used, and in the other they never worked properly. A. sued the United States for the money so paid. *Held*, that he was not entitled to recover. *Finch* v. *United States*, 269.

DISTRAINT. See *Constitutional Law*, 8.

DISTRICT OF COLUMBIA, SUPREME COURT OF.

1. The Supreme Court of the District of Columbia is authorized to issue the writ of *mandamus* as an original process in cases where, by the principles of the common law, the petitioner is entitled to it. *United States* v. *Schurz*, 378.
2. Sect. 858 of the Revised Statutes of the United States, which declares "that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court," applies to the courts of the District of Columbia as fully as to the Circuit and District Courts of the United States. *Page* v. *Burnstine*, 664.

DIVIDED COURT, JUDGMENT BY. See *State Courts, Re-examination of the Final Judgments and Decrees of*, 4.

DUE PROCESS OF LAW. See *Constitutional Law*, 8.

DUTIES. See *Constitutional Law*, 8, 10; *Customs Duties.*

EJECTMENT. See *Appeal*, 6; *Confiscation*; *Estoppel*, 1; *Income Tax*, 1.

The mortgagee of a homestead in Texas cannot maintain ejectment therefor, if the "forced sale" thereof be prohibited by the Constitution of the State which was in force at the date of the mortgage. *Lanahan* v. *Sears*, 318.

ENTRY, RIGHT OF. See *Lands sold for the Non-payment of Taxes.*

EQUITABLE ESTOPPEL. See *Estoppel*, 1.

EQUITY. See *Damages; Deed of Trust; Municipal Corporations*, 4.

1. A bill in chancery to set aside a judgment or a decree of a court of competent jurisdiction on the ground of fraud must set out distinctly the particulars of the fraud, the names of the parties who were engaged in it, and the manner in which the court or the party injured was misled or imposed on. *United States* v. *Atherton*, 372.
2. A bill to set aside or annul a patent of the United States for public lands, or to correct it on account of fraud or mistake, must show, by like averments, the particulars of the fraud, and the character of the mistake and how it occurred. *Id.*

EQUIVALENTS. See *Letters-patent*, 11.

ESTOPPEL. See *Claims against the United States; Court of Claims*, 1; *Deed, Disaffirmance of*, 2; *Foreign Coins, Value of; Judgment; Municipal Bonds*, 1, 8, 9.

1. In 1859, M. & Co., judgment creditors of A., filed their bill in the Circuit Court of the District of Columbia, against him and others, setting forth that he had, without consideration and with intent to defraud his creditors, conveyed to the other defendants his real estate in that district. It was adjudged, May 30, 1860, that certain lots of ground be sold by a trustee to pay M. & Co. and such other creditors as might come in according to the practice of the court. The trustee subsequently reported that, having sold a part of the lots and realized more than sufficient to pay M. & Co., he had discontinued the sale. His report was confirmed Nov. 28, 1862. An order of the court, Nov. 14, 1863, recites that certain other creditors of A. had filed petitions in support of their claims, and directs that he being then a non-resident, notice of the character and object of the petitions be given him by publication. Publication was made accordingly, and the defendants failing to appear, the bill was taken as confessed. The case was referred to an auditor, who reported that the claims were in excess of the proceeds of the sale remaining in the hands of the trustee. His report was confirmed. Thereupon the trustee, without any order other than that entered May 30, 1860, proceeded to sell the remainder of the lots to B. for $950. The sale was confirmed, and the cause referred to an auditor to state the accounts of the trustee and report a distribution. A. appeared before the auditor and objected to the allowance of the simple-contract debts. The report of the auditor was confirmed, and the lots were conveyed by the trustee's deed bearing date Dec. 14, 1865, to B., who entered thereon, and made improvements to the value of $4,000. A., who then resided upon a lot adjoining the premises, asserted no claim to them except as to three feet for an alley, and he afterwards admitted that even in regard to that part he was mistaken. A., Dec. 21, 1872, claiming that the trustee's sale was void and passed no title, and having obtained a deed from the party to whom he had

ESTOPPEL (*continued*).

in trust previously conveyed the lots so purchased by B., brought ejectment against the latter. *Held*, that, without affirming that the sale to B. was valid in the absence of a special direction by the court to the trustee to sell after the first order had been executed, A.'s failure to object to its validity and apply to the court to set it aside, and his not asserting any title to the premises although he had knowledge that B., claiming them under a judicial sale confirmed by a court of general jurisdiction, was expending money and making improvements thereon, constituted an equitable estoppel which precludes the maintenance of the action. *Kirk* v. *Hamilton*, 68.

2. *Dickerson* v. *Colgrove* (100 U. S. 578) cited and approved. *Id.*

3. The convention of the State of Virginia passed, April 13, 1861, an ordinance entitled "An Ordinance to provide against the sacrifice of property and to suspend proceedings in certain cases," whereby, if a debtor, against whom there was an execution in the hands of an officer, offered bond and security for the payment of debt, interest, and costs, when the operation of the ordinance should cease, his property should be restored to him. If he offered no bond, the property was to be restored to him without lien, unless it would bring its appraised value as of the date of Nov. 6, 1860. No executions were, after the date of the ordinance, to be issued against residents except in favor of the State. The convention passed, April 18, 1861, an ordinance of secession. A., against whom an execution was issued March 21 of that year, availed himself of the provisions of the ordinance of April 13, by giving the requisite bond and security. The judgment against him remaining unpaid and the ordinance having ceased to operate, suit was brought on the bond. *Held*, that the obligors are estopped from setting up that, by reason of anything contained in the ordinance, the bond is invalid. *Daniels* v. *Tearney*, 415.

4. *Home Insurance Co.* v. *City Council of Augusta* (93 U. S. 116) and *United States* v. *Hodson* (10 Wall. 395) cited and approved. *Id.*

5. In an action by the United States upon a bond executed by A., a distiller, and his sureties, the breaches of the condition assigned in the declaration or complaint were, first, that by omitting to make certain entries in a book which he, by sect. 3303, Rev. Stat., was required to keep, he was enabled to defraud, and did defraud, the United States of the tax imposed by law upon the spirits produced at his distillery; and, second, that in violation of sect. 3296 he had removed spirits produced at his distillery to a place other than the distillery warehouse, without the tax thereon having been first paid. To the first assignment the defendants answered by denying its allegations, and averring that whatever fraud was committed was effected through other means than those charged. To the second they answered, that, before the suit was brought, two bills of indictment, for the same removals of spirits now complained of, were found against A., one containing counts upon said section and upon sections 3281 and 5440, and that upon the recommendation of the Attorney-General and the advice of the Secretary of the Treasury the

ESTOPPEL (*continued*).

Commissioner of Internal Revenue accepted from him a specified sum, in a compromise, satisfaction, and settlement of the indictments, which were thereupon dismissed and abandoned by the United States. Upon a demurrer to the answer, — *Held*, that the answer was a bar to the action. *United States* v. *Chouteau*, 603.

6. A decree dismissing a bill *without prejudice* is not a bar to a subsequent suit for the same cause of action. *County of Mobile* v. *Kimball*, 691.

EVIDENCE. See *Bills of Exchange and Promissory Notes*, 2, 3; *Court and Jury*, 3; *Foreign Coins, Value of; Income Tax*, 1.

1. Parol evidence of the surrounding circumstances is admissible to show the subject-matter of a contract. *United States* v. *Peck*, 64.
2. In an action against an executor in his representative capacity, A., who was interested in the issue but not a party thereto, was, against the objection of the defendant, introduced as a witness by the plaintiff, and permitted to testify to statements of the testator touching the subject-matter in controversy. *Held*, that the witness was competent and the evidence admissible. *Potter* v. *National Bank*, 163.
3. Where, upon a bill to foreclose a mortgage upon a railroad, a creditor who had sued out an attachment against A., former owner of the road, and caused it to be levied thereon, was made a party defendant, — *Held*, that A.'s deed transferring his interest in the road to the trustees named in the mortgage and to the railroad company bearing date before the attachment against him was sued out, but not recorded until thereafter, was admissible in evidence. *People's Bank* v. *Calhoun*, 256.
4. In determining whether the constitutional limit of the indebtedness of a city in Illinois had been exceeded by the issue of certain bonds, the court permitted — there having been no separate assessment of the property within the city for the preceding year made or required by law — the introduction of the assessments for State and county taxes embracing all taxable property within the county and townships of which the city formed a part, from which, in connection with a map, the location and taxable value of all the property within the limits of the city for that year could be readily ascertained. *Held*, that the evidence, being the best which the law afforded, was properly admitted. *Buchanan* v. *Litchfield*, 278.
5. In questions of private boundary, the declaration of a deceased person of particular facts, as distinguished from reputation, is not admissible unless it be shown that he had knowledge of that whereof he spoke, and was then on the land, or in possession of it, and was pointing out and marking the boundary, or discharging some duty in relation thereto. A declaration, merely reciting something past, is within the rule which excludes hearsay evidence. *Hunnicutt* v. *Peyton*, 333.
6. The decisions of the Supreme Court of Texas examined, and *held* to be in harmony with this ruling. *Id.*

EVIDENCE (*continued*).

7. Where a party is entitled to merely compensatory damages for injuries to his person, evidence as to his poverty, or the number and ages of his children, is irrelevant. *Pennsylvania Company* v. *Roy*, 451.
8. The account of a delinquent revenue officer or other person accountable for public money, as finally adjusted by the proper officers of the Treasury Department, is not admissible as evidence under sect. 886, Rev. Stat., unless it be certified and authenticated to be a transcript from the books and proceedings of that department. A certificate, therefore, which states that the transcript, to which it is annexed, is a copy of the original on file is not sufficient, that being the form used in reference to mere copies of bonds, contracts, or other papers connected with the final adjustment. *United States* v. *Pinson*, 548.
9. When, in an action at law upon his bond, the defendant sets up that it was procured from him by fraud, no evidence in support of the plea is admissible, except that which relates to the execution of the instrument. *George* v. *Tait*, 564.
10. Sect. 858 of the Revised Statutes of the United States, which declares "that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court," applies to the courts of the District of Columbia as fully as to the Circuit and District Courts of the United States. *Page* v. *Burnstine*, 664.

EXCEPTIONS, BILL OF. See *Jurisdiction*, 1, 6; *Practice*, 3, 4.

EXCISE. See *Constitutional Law*, 10.

EXECUTION. See *Contracts*, 1.

EXECUTOR, ACTION AGAINST. See *Evidence*, 2, 10.

FACT, FINDINGS OF. See *Jurisdiction*, 6.

1. Where, under the practice established in Utah, issues are tried by the court, its findings of fact should be announced and filed before the entry of the judgment. *Kahn* v. *Smelting Company*, 641.
2. After such entry, an additional finding, made at the request of either party without notice to the other, forms no part of the record. *Id.*
3. In a suit to compel an account for the proceeds of a mining claim, a finding by the court that there was no such co-tenancy between the parties in the mine in controversy as to entitle the plaintiff to an accounting is a mere legal inference, and not a sufficient finding of fact upon which to base a decree. *Id.*

FEDERAL QUESTION. See *Jurisdiction*, 7–9.

FEE BOND. See *Appeal*, 5; *Practice*, 6.

FEME COVERT. See *Deed, Disaffirmance of.*

FIRM NAME. See *Partnership.*

FORCED SALE. See *Ejectment.*

FORECLOSURE. See *Appeal; Evidence; Mortgaged Lands in Illinois, Redemption of.*

FOREIGN COINS, VALUE OF.

1. The valuation of foreign standard coins, which the act of March 3, 1873, c. 268 (17 Stat. 602; Rev. Stat., sect. 3564), requires the director of the mint to estimate annually, and the Secretary of the Treasury to proclaim on the first day of January, is as binding on collectors of customs and importers, as if declared by statute; and evidence is not receivable to show that it is inaccurate. *The Collector* v. *Richards* (23 Wall. 246) cited and reaffirmed. *Cramer* v. *Arthur*, 612.
2. Pursuant to sect. 2903 of the Revised Statutes, providing for the case of invoices made out in a depreciated currency issued and circulated under authority of any foreign government, regulations were established declaring that where the standard value of a foreign currency has been proclaimed by the Secretary of the Treasury, in the manner provided by law, such value shall control in estimating customs duties, unless collectors have been otherwise instructed, or unless a depreciation of the value of that currency, "expressed in an invoice from the standard of that currency, shall be shown by consular certificate thereto attached." *Held*, that the proclamation and certificate are conclusive. *Id.*

FOREIGN COMMERCE. See *Commerce*, 5.

FORMER RECOVERY. See *Estoppel*, 5.

FRANCHISE. See *Taxation.*

FRAUD. See *Appeal*, 7; *Corporations; Pleading.*

FRAUDULENT PREFERENCE. See *Assignee in Bankruptcy; Bankruptcy*, 1, 5, 6.

GRANT, ACCEPTANCE OF. See *Patent of the United States for Land*, 5.

GUARDIAN. See *Evidence*, 10.

HEARSAY. See *Deceased Person, Declarations of.*

HOMESTEAD, MORTGAGEE OF, IN TEXAS. See *Ejectment.*

HUSBAND AND WIFE. See *Deed, Disaffirmance of.*

ILLINOIS. See *Income Tax*, 2; *Mortgaged Lands in Illinois, Redemption of; Municipal Bonds*, 7–11.

IMMUNITY. See *Taxation.*

IMPORTS, DUTIES ON. See *Customs Duties.*

IMPOSTS. See *Constitutional Law*, 8

INADEQUATE CONSIDERATION. See *Corporations.*

INCOMES, TAX ON. See *Income Tax.*

INCOME TAX.

1. Certain lands of A. were distrained and sold by reason of his refusal to pay the income tax assessed against him under the act of June 30, 1864 (13 Stat. 218), as amended by the act of March 3, 1865 (id. 469), he having no goods or chattels known to the proper officers out of which the tax and penalty could have been made. The United States became the purchaser of the lands, received a deed therefor, and brought ejectment against him. *Held*, that he cannot raise the question here that the deed, inasmuch as it refers to the act of March 30 instead of that of June 30, should, on the trial, have been excluded from the jury, as that objection to its admissibility in evidence was not made in the court of original jurisdiction. *Springer* v. *United States*, 586.
2. Where the collector acted in good faith, it was not improper for him, in the exercise of his discretion, to sell as an entirety the lands, consisting of two town lots which were enclosed and occupied as a single homestead, a dwelling-house being upon one of them and a barn on the other. The statute of Illinois under which they were separately assessed for State taxation has no application to his proceedings. *Id.*
3. Congress, in the exercise of its power "to lay and collect taxes, duties, imposts, and excises," may, to enforce their payment, authorize the distraint and sale of either real or personal property. The owner of the property so distrained and sold is not thereby deprived of it without due process of law. *Id.*
4. The duty which the internal revenue acts provided should be assessed, collected, and paid upon gains, profits, and incomes was an excise or duty, and not a direct tax, within the meaning of the Constitution. *Id.*

INDIANA. See *Lands, Partition of*, 1.

INDIAN TRIBES, LANDS IN POSSESSION OF.

Where an act of Congress admitting a State into the Union, or organizing a territorial government, provides, in accordance with a treaty stipulation, that the lands in the possession of an Indian tribe shall not be a part of such State or Territory, the new government has no jurisdiction over them. *Harkness* v. *Hyde* (98 U. S. 476) qualified and explained. *Langford* v. *Monteith*, 145.

INDICTMENT. See *Criminal Law.*

INDIVIDUALS, PRIVATE PROPERTY OF. See *Municipal Corporations*, 2.

INDORSEMENT. See *Bills of Exchange and Promissory Notes*, 8.

INDORSER. See *Bills of Exchange and Promissory Notes*, 1, 8; *Judgment*, 1.

INFANT. See *Deed, Disaffirmance of.*

INFERENCE. See *Practice*, 9.

INFRINGEMENT. See *Letters-patent*, 3, 10, 14, 16.

INSTRUCTIONS TO JURY. See *Court and Jury.*

INSURANCE, POLICY OF. See *Assignment*, 2.

INTEREST.

A patentee is not, in an action for the infringement of his letters-patent, entitled to interest on the profits realized by the infringer. *Parks* v. *Booth*, 96.

INTERNAL REVENUE. See *Income Tax; Public Money, Person accountable for.*

INTER-STATE COMMERCE. See *Commerce*, 5.

IOWA. See *Constitutional Law*, 2; *Lands sold for the Non-payment of Taxes; Mortgage*, 1.

JUDGMENT. See *Assignment*, 1.

1. The judgment in an action brought by the holder of negotiable paper against the indorsers, is not a bar to his subsequent action against the maker, who was not notified of the pendency of the first action. *Railroad Company* v. *National Bank*, 14.
2. An estoppel by judgment is equally conclusive upon all the parties to the action and their privies, and may not be invoked or repudiated at the pleasure of one of them as his interest may require. *Id.*

JUDGMENT, BILL TO SET ASIDE A. See *Pleading*, 1.

JUDICIAL SALE. See *Mortgaged Lands in Illinois, Redemption of.*

JURISDICTION. See *Causes, Removal of; District of Columbia, Supreme Court of*, 1; *Lands, Partition of*, 2; *State Courts, Jurisdiction of; State Courts, Re-examination of the Final Judgments or Decrees of*, 4.

I. Of the Supreme Court.

1. Neither the charge of the court below, if no exception was taken thereto before the final submission of the case to the jury, nor the granting or the refusing a new trial, is subject to review here. *Railway Company* v. *Heck*, 120.
2. An appeal will be dismissed when it appears from the record, taken as a whole, that the amount actually in controversy is not sufficient to give this court jurisdiction. *Banking Association* v. *Insurance Association*, 121.
3. *Gray* v. *Blanchard* (97 U. S. 564) reaffirmed. *Id.*
4. An appeal is the only mode by which the appellate jurisdiction of this court can be exercised in equity suits, brought in the courts of the United States, and it does not lie before a final decree has been rendered. *Hayes* v. *Fischer*, 121.

JURISDICTION (*continued*).

5. A proceeding in the court below for contempt cannot be re-examined here on an appeal or a writ of error. *Id.*
6. The ruling in *The Abbotsford* (98 U. S. 440), that under the act of Feb. 16, 1875 (18 Stat. 315), the finding of facts by the Circuit Court in admiralty cases is conclusive, and that only rulings upon questions of law can be reviewed by bill of exceptions, reaffirmed. *The "Benefactor,"* 214.
7. This court, in *Martin* v. *Hunter's Lessee* (1 Wheat. 85), affirmed the constitutionality of sect. 25 of the Judiciary Act of 1789 (1 Stat. 85, re-enacted in sect. 709, Rev. Stat.), which, in certain cases therein mentioned, confers on this court jurisdiction to re-examine upon a writ of error the final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had. The doctrine then asserted, and ever since maintained, cannot be questioned here. *Williams* v. *Bruffy*, 248.
8. That jurisdiction attaches whenever the highest court of a State, by any decision which involves a Federal question, affirms or denies the validity of the judgment of an inferior court, over which it can by law exercise appellate authority, whether the decision, after an examination of the record of that judgment, be expressed by refusing a writ of error or *supersedeas*, or by dismissing a writ previously allowed. *Id.*
9. This court, when it has once acquired jurisdiction, may, in order to enforce its judgment, send its process to either the appellate, or the inferior, court. *Id.*
10. Where the marshal of the United States, to whom was directed a warrant of provisional seizure, sued out of the proper court sitting in bankruptcy, levied it upon certain goods in the possession of a third party claiming title to them, — *Held*, that this court has jurisdiction to re-examine the judgment of a State court, whereby it was held in a suit against the marshal that, by reason of such possession, he had no authority under the laws of the United States to so levy the warrant. *Sharpe* v. *Doyle*, 686.

II. OF THE CIRCUIT COURT.

11. Where a bill is filed to enforce a claim or lien upon a specific fund within reach of the court, and such of the defendants as are neither inhabitants of nor found within the district do not voluntarily appear, the Circuit Court has jurisdiction to adjudicate upon their right to, or interest in, the fund, if they be notified of the pendency of the suit by service or publication, in the mode prescribed by sect. 738 of the Revised Statutes. *Goodman* v. *Niblack*, 556.
12. In such a case, where it appears by the bill that certain non-residents are indispensable parties, and they are not made parties, the bill is bad on demurrer, and should be dismissed without prejudice. *Id.*

III. IN GENERAL.

13. The courts of the United States, as courts of admiralty, have not exclusive jurisdiction of suits *in personam*, growing out of collisions

JURISDICTION (*continued*).
between vessels while navigating the Ohio River. *Schoonmaker* v. *Gilmore*, 118.
14. The decisions of this court affirming the jurisdiction of the courts of the United States in cases arising under the laws of the United States, or where a State is a party, cited and commented on. *Railroad Company* v. *Mississippi*, 135.
15. Where an act of Congress admitting a State into the Union, or organizing a territorial government, provides, in accordance with a treaty stipulation, that the lands in the possession of an Indian tribe shall not be a part of such State or Territory, the new government has no jurisdiction over them. *Harkness* v. *Hyde* (98 U. S. 476) qualified and explained. *Langford* v. *Monteith*, 145.
16. Where, in a civil suit before a justice of the peace of the Territory of Idaho, it appears by the answer of the defendant, verified by his affidavit, that the question of title to real estate is necessarily involved, the justice should certify the case to the District Court for trial. If he proceeds to try it, it must, on appeal from his judgment, be dismissed. *Id.*

JURY. See *Court and Jury*.

JURY, TRIAL BY. See *Court of Claims*, 2.

LAND DEPARTMENT, DECISIONS OF THE OFFICERS THEREOF.
1. In the progress of the proceedings to acquire, under the laws of the United States, a title to public land, the power of the Land Department over them ceases when the last official act necessary to transfer the title to the successful claimant has been performed. *United States* v. *Schurz*, 378.
2. Title by patent from the United States is title by record, and the delivery of the instrument to the patentee is not, as in a conveyance by a private person, essential to pass the title. *Id.*
3. Therefore, when the officers whose action is rendered by the laws necessary to vest the title in the claimant have decided in his favor, and the patent to him has been duly signed, sealed, countersigned, and recorded, the title to the land passes, and the ministerial duty of delivering to him the instrument can be enforced by *mandamus*. *Id.*
4. An acceptance of the grant will, in such case, be presumed from his efforts to secure the favorable action of the department, and especially from his demand for the possession of the patent. *Id.*

LAND GRANTS. See *School Lands*, 1.

LAND, LIABILITY OF OWNER OF.
The owner or occupant of land who induces or leads others to come upon it for a lawful purpose is liable in damages to them — they using due care — for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and he negligently suffered it to exist, without giving timely notice thereof to them or the public. *Bennett* v. *Railroad Company*, 577.

LANDS, PARTITION OF.

1. Proceedings for the partition of real estate in Indiana were instituted in the year 1832, in the circuit court of the county where it is situate. The record consists of an order appointing three commissioners to divide the land between the several proprietors, their report at the next term, and its confirmation by the court. The report complies in its details with the requirements of the statute, gives the boundaries of the land, sets forth with proper description the portion assigned to each proprietor, and is accompanied by a plat showing the tracts assigned. *Held*, that it is not a valid objection to the proceedings when they collaterally come in question that no petition or complaint appears in the record as the foundation of them. *Hall* v. *Law*, 461.
2. When the recitals in the record show the jurisdiction of the court and its compliance with the statute, the order appointing commissioners is an adjudication affirming the sufficiency of the application and notice, which can be questioned only in a direct review of the proceedings in an appellate court. *Id.*

LANDS, SALE OF, FOR THE NON-PAYMENT OF THE INCOME TAX. See *Income Tax.*

LANDS SOLD FOR THE NON-PAYMENT OF TAXES.

1. The right of entry of a party who claims under the treasurer's deed lands in Iowa sold for the non-payment of taxes is barred, if, within five years after the deed has been executed and recorded, he neither sues for nor takes actual possession of the lands. *Barrett* v. *Holmes*, 651.
2. A statutory provision to that effect is not in conflict with the Constitution of the United States. *Id.*

LAPSE OF TIME. See *Limitations, Statute of.*

LETTERS-PATENT.

1. Reissued letters-patent No. 1826, granted Nov. 29, 1864, to Jonathan L. Booth for a new and useful improvement in grain-separators, are valid. *Parks* v. *Booth*, 96.
2. A specification describing an invention consisting merely of a new combination of old elements or devices which produces a new and useful result is sufficient if they be specifically named, their mode of operation given, and the result pointed out, so that those skilled in the art and the public may know the extent and nature of the claim and what the parts are which co-operate to do the work claimed for the invention. *Id.*
3. Where, in a suit for the infringement of letters-patent for such a combination, the parts of which are not susceptible of division or separate use, the answer sets up that the complainant is not the first and original inventor of it, the defence, to be available, must apply to the combination as an entirety, and not to a part of it, or to one or more of the claims of the letters, if they do not cover the entire invention. *Id.*

LETTERS-PATENT (*continued*).

4. A patentee is not entitled to reimbursement for counsel fees paid or expenses incurred by him, other than his taxable costs, nor to interest on the profits realized by an infringer. *Id.*
5. To entitle an improvement to protection under the patent laws, it must be the product of the exercise of the inventive faculties, and involve something beyond what is obvious to persons skilled in the art to which it relates. *Pearce* v. *Mulford*, 112.
6. Reissued letters-patent No. 5774, granted Feb. 24, 1874, to "Shubael Cottle, assignor to Mulford, Hale, & Cottle," for an improvement in chains and chain links for necklaces, &c., are void, the first claim for want of patentability in the alleged invention, and the second for want of novelty. *Id.*
7. *Quære*, whether said first claim is not also void for want of novelty. *Id.*
8. Reissued letters-patent No. 4026, granted June 14, 1870, to Hosea Ball for a new and useful improvement in ovens, are void, inasmuch as they contain new matter, and are for an invention different from that exhibited in the original specification and drawings. *Ball* v. *Langles*, 128.
9. The ruling in *Seymour* v. *Osborne* (11 Wall. 516) and *Russell* v. *Dodge* (93 U. S. 460), touching the authority of the Commissioner of Patents in granting a reissue of letters-patent, reaffirmed. *Id.*
10. The invention for which reissued letters-patent No. 1904, dated March 21, 1865, were granted to the Goodyear Dental Vulcanite Company was a set of artificial teeth, as a new article of manufacture, consisting of a plate of hard rubber with teeth, or teeth and gums, secured thereto in the manner described in the specification, by embedding the teeth and pins in a vulcanizable compound, so that it shall surround them while it is in a soft state, before it is vulcanized, and so that when it has been vulcanized the teeth are firmly and inseparably secured in the vulcanite, and a tight joint is effected between them, the whole constituting but one piece. *Held*, that the invention being a product or manufacture made in a defined manner, and not the product alone, separated from the process by which it is created, the process is as much a part of the invention as is the material of which the plate or product is composed. *Goodyear Dental Vulcanite Company* v. *Davis*, 222.
11. Those letters are not infringed otherwise than by using the material and the process or their equivalents. A plate made of celluloid is not, therefore, an infringement, as celluloid is not an equivalent for hard rubber, and in preparing it for that purpose the process, which is inseparable from the invention, cannot be employed. *Id.*
12. *Ball* v. *Langles* (*supra*, p. 128) reaffirmed. *Garneau* v. *Dozier*, 230.
13. Reissued letters-patent No. 6397, granted April 20, 1875, to Duncan McKenzie for a new and useful improvement in baker's ovens, must, in view of the state of the art at the time the original letters were granted, be so construed as to limit the element of the combination which relates to the communication between the furnace or

LETTERS-PATENT (*continued*).

fireplace and the interior of the oven, to the peculiar structural arrangement, whereby the products of combustion are admitted into the baking-chamber through openings in the arch or top of the furnace, and through the floor of the oven that separates it from the fire-chamber along the flues extending rearward from the furnace to the back part of the oven. *Id.*

14. There is, therefore, no infringement of the reissued letters where the bottom of the baking-chamber is not separated by any partition or diaphragm from the fire-chamber or furnace, and there are no flues to conduct the generated heat into the chamber. *Id.*

15. Reissued letters-patent No. 2261, dated May 29, 1866, issued to James Densmore and Amos Densmore for "a new and useful improved oil-tank car for carrying petroleum and other like substances in bulk," are void, — the alleged invention described in the specification being destitute of utility and novelty. *Densmore* v. *Scofield*, 375.

16. Where a bill was filed charging an infringement of reissued letters-patent No. 5154, dated Nov. 19, 1872, which was denied by the answer, the court, in view of the state of the art at the date of the invention for which the original letters were granted to Asa M. Swain, May 11, 1860, for improvements in water-wheels, construed the claims of the reissued letters in accordance with the distinct limitation of that invention in the original letters to a wheel of specific construction and form with its associated apparatus, and, finding that there was no infringement of the claims thus construed, dismissed the bill. *Held*, that such a construction gave the complainant no just ground of exception. *Manufacturing Company* v. *Ladd*, 408.

17. The evidence examined, and the result of a comparison of the reissued letters with the original letters, including the drawings and model submitted with the application for them, stated. *Id.*

18. A reissue can only be granted for the same invention which was originally patented. *Id.*

19. Letters-patent for a process, irrespective of the particular mode or form of apparatus for carrying it into effect, are admissible under the patent laws of the United States. *Tilghman* v. *Proctor*, 707.

20. To sustain such letters, the patentee should be the first and original inventor of the process, and claim it in them. If the means of carrying it out are not obvious to ordinary mechanics skilled in the art, his specification should describe some mode of carrying it out which will produce a useful result. *Id.*

21. A party who subsequently discovers a new mode of carrying out a patented process, and obtains letters-patent therefor, is not entitled to use the process without the consent of the patentee thereof. *Id.*

22. *Mitchell* v. *Tilghman* (19 Wall. 287) reviewed and overruled; and the letters-patent No. 11,766, granted Oct. 3, 1854, to Richard A.

LETTERS-PATENT (*continued*).
Tilghman, and subsequently renewed and extended, relating to the manufacture of fat acids, sustained as letters for a process. *Id.*
23. *O'Reilly* v. *Morse* (15 How. 62) and *Neilson* v. *Thompson* (Web. P. C. 275) commented upon and explained. *Id.*

LIEN. See *Jurisdiction*, 11, 12; *Taxation*, 1.
A., to secure the payment of his note to B., executed to C. a deed of trust of land of even date therewith, which was duly recorded. A. afterwards conveyed the land to D., and it became the property of C. through sundry mesne conveyances duly recorded, each of which, including that to C., recited that the land was subject to the deed of trust. C. then, to secure the payment of certain bonds, made a deed of trust of the land, which was duly recorded; and subsequently there was filed for record an instrument executed by him, purporting to release to his grantor "all the right, title, interest, claim, and demand" which he, C., had acquired by virtue of the trust-deed executed to him by A. to secure the note. The release did not acknowledge the payment of the note. C. thereafter made another deed of trust. E. was, long prior to the execution of the conveyances, except the deed of trust and that from A. to D., the lawful holder of A.'s note, it having for a valuable consideration been duly assigned to him before its maturity. *Held*, that E. was entitled to the lien created by A.'s deed of trust. *Swift* v. *Smith*, 442.

LIFE INSURANCE. See *Assignment; Condition Precedent.*

LIMITATIONS, STATUTE OF. See *Bankruptcy*, 6; *Lands Sold for the Non-payment of Taxes.*
1. An instrument gives color of title, — whether the grantor acts under authority of judicial proceedings or otherwise, — if by apt words of transfer it passes what purports to be the title; and the grantee's possession of the lands thereunder for the period mentioned in the Statute of Limitations bars the true owner's right of recovery. *Hall* v. *Law*, 461.
2. Where the complainant is out of possession, and the determination in his favor is only preliminary to a decree against the defendant for the surrender of the possession, the suit, although in form a proceeding in equity, so nearly resembles the common-law action of ejectment as to justify the application of that statute. *Id.*

LIS PENDENS. See *Appeal*, 6.

LOCAL ACTIONS. See *State Courts, Jurisdiction of.*

LOUISIANA. See *Constitutional Law*, 4; *Contracts*, 8.

MANDAMUS. See *Causes, Removal of*, 1; *Contracts*, 6; *Municipal Bonds*, 5; *Patent of the United States for Land*, 4.
1. This court will not by *mandamus* compel an inferior court to reverse a decision made in the exercise of its jurisdiction. *Ex parte Perry*, 183.

MANDAMUS (*continued*).

2. The Supreme Court of the District of Columbia is authorized to issue the writ of *mandamus* as an original process in cases where, by the principles of the common law, the petitioner is entitled to it. *United States* v. *Schurz*, 378.
3. The judgment in a proceeding for a *mandamus* is subject to review on the same conditions as that in any other action. *Hartman* v. *Greenhow*, 672.

MARSHAL. See *Bankruptcy*, 7, 8.

MARSHAL'S DEED. See *Confiscation*, 1.

MEMPHIS, CITY OF. See *Municipal Corporations.*

MERCANTILE PAPER. See *Bills of Exchange and Promissory Notes*

MEXICAN LAND-GRANTS.

A party who, under article 24 of the Mexican law of 1825, procured from the government, by purchase, a grant of public lands, could alienate it before they were selected; and his formal act of sale, with a power to his alienee to obtain the title of possession, constituted the latter the absolute owner of them, when he, by the proper officer, was furnished with the evidence of title and put in possession. Where, therefore, the grant contained no specific description of the lands, but contemplated the selection and location of them, the title of extension, when given to the alienee, is complete. *Hunnicutt* v. *Peyton*, 333.

MINERAL LANDS. See *School Lands*, 1.

MINING PARTNERSHIP. See *Practice*, 9.

A member of "a mining partnership" may, without dissolving it, convey his interest in the mine and business. *Kahn* v. *Smelting Company*, 641.

MISSISSIPPI. See *Causes, Removal of*, 1; *Municipal Bonds*, 15.

According to the ruling of the highest court of Mississippi, the financial powers conferred by the general law upon boards of supervisors of counties in that State do not include that of borrowing money. *Wells* v. *Supervisors*, 625.

MISSISSIPPI RIVER, RIPARIAN OWNERS ON. See *Constitutional Law*, 2.

MISSOURI. See *Municipal Bonds*, 12, 17, 18; *Personal Chattels, Sale and Delivery of.*

MISSOURI RIVER, RIPARIAN OWNERS ON. See *Constitutional Law*, 2.

MISTAKE. See *Pleading*, 2.

MORTGAGE. See *Ejectment; Mortgaged Lands in Illinois, Redemption of; Personal Chattels, Sale and Delivery of.*

1 A railroad company in Iowa, after executing a mortgage to secure its bonds, which was duly recorded, covering all the property which it then possessed or might thereafter acquire, entered into a written contract with A., leasing for a specific period and at a stipulated sum, payable monthly, certain cars whereof he was the owner. It also reserved but did not exercise the privilege of purchasing them at the original cost at any time during the existence of the contract. A. retained the right to rescind the contract, if the company failed to pay the interest on its bonds. While the contract was in force, the mortgagee filed his bill of foreclosure. The court appointed a receiver, who took charge of the road and used the cars in operating it. The contract was never recorded. *Held*, 1. That the contract was binding between the parties thereto, and the failure to record it did not, under the statute of Iowa, render the cars subject to the lien of the mortgage. 2. That A. was entitled to the possession of them, and to compensation for their use by the receiver, payable out of the fund to the credit of the suit. *Myer* v. *Car Company*, 1.

2. Where a party, on receiving an absolute deed, covenants with his grantor to reconvey the lands, when the money which it was given to secure shall be paid, both instruments must be taken together as constituting a mortgage. *Lanahan* v. *Sears*, 318.

MORTGAGED LANDS IN ILLINOIS, REDEMPTION OF.

The court adheres to the rule announced in *Brine* v. *Insurance Company* (96 U. S. 627), touching the statutory right of redeeming mortgaged lands in Illinois after a judicial sale under a decree of foreclosure of a mortgage or deed of trust. *Swift* v. *Smith*, 442.

MUNICIPAL BONDS.

1. A town in Wisconsin, being thereunto authorized by law, subscribed for stock in a railroad company, and issued its bonds in payment therefor, each reciting that it "shall be valid only when it is thereon duly certified that the conditions upon which it was voted, issued, and deposited by said town have been performed." Suit was brought on the bonds by a party who in good faith purchased them before they matured. *Held*, that the certificate on the bonds (*supra*, p. 87) is in proper form, estopping the town from denying their validity, and placing them in a condition to be put on the market as commercial paper. *Menasha* v. *Hazard*, 81.

2. Where, before the subscription and bonds were voted, the company was authorized to consolidate with other companies constructing connecting lines, and such consolidation was effected, — *Held*, that the issue of the bonds to the consolidated company was lawful. *Id.*

3. *County of Scotland* v. *Thomas* (94 U. S. 682) and *Wilson* v. *Salamanca* (99 id. 499) approved. *Id.*

4. Where a court of county commissioners in Alabama, pursuant to the act of Dec. 31, 1868 (Pamphlet Laws of 1868, p. 514), subscribed for stock in a railroad company, and issued the bonds of the county

MUNICIPAL BONDS (*continued*).
in payment therefor, the holder of them, or of the coupons thereto attached, is not required to present them when due to that court for allowance, before commencing suit, to enforce their payment. *County of Greene* v. *Daniel*, 187.

5. In case of non-payment, a *mandamus* will, by the laws of the State, lie against that court to compel the assessment and levy of the necessary taxes; but the holder who resorts to the courts of the United States must there reduce the bonds or the coupons to judgment, before he is entitled to that remedy. *Id.*

6. The court of county commissioners may cause the bonds to be executed in such denominations as may be agreed upon by it and the railroad company, provided the total amount for which they are issued does not exceed that set forth in the proposal accepted by the vote of the qualified electors of the county. *Id.*

7. The twelfth section of the ninth article of the Constitution of Illinois, adopted in 1870, declares that "no county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness." Under a statute of that State, approved April 15, 1873, authorizing cities to construct water-works, and for that purpose to appropriate and borrow money, and levy and collect a general tax in the same manner as other municipal taxes may be levied and collected, the city of Litchfield, by her ordinance, authorized and directed the issue of city bonds not exceeding a certain amount to be used for borrowing money for the erection, construction, and maintenance of water-works for the use of the people of that city. Bonds in the form and amount prescribed were accordingly issued, bearing date Jan. 1, 1874. Each recites that it "is issued under authority of an act of the General Assembly of the State of Illinois, entitled 'An Act authorizing cities, incorporated towns, and villages to construct and maintain water-works,' approved April 15, 1873, and in pursuance of an ordinance of the said city of Litchfield, No. 184, and entitled 'An Ordinance to provide for the issuing of bonds for the construction of the Litchfield water-works,' approved Dec. 4, 1873." The said twelfth section is not referred to in the statute or the ordinance, nor does the latter make mention of the city's indebtedness, although at the time of the issue of the bonds it exceeded the constitutional limit. A *bona fide* holder of them brought suit upon the unpaid coupons thereto attached. *Held*, that he was not entitled to recover. *Buchanan* v. *Litchfield*, 278.

8. Inasmuch as neither the Constitution nor the statute prescribes any mode by which a party dealing with the city can ascertain the amount of her indebtedness, *quære*, if the bonds had contained recitals which could be justly interpreted as amounting to a representation by her constituted authorities, that her indebtedness, increased

MUNICIPAL BONDS (*continued*).
by the amount of the bonds, did not exceed the constitutional limit, would she, as against a *bona fide* holder of them, be estopped from disputing the truth of such representations. *Id.*

9. The present case distinguished from others, wherein it was held that certain recitals in the bonds of a municipal corporation were conclusive as to their validity, and its liability to pay them. *Id.*

10. In determining whether the constitutional limit of the indebtedness of the city had been exceeded by the issue of the bonds, the court permitted — there having been no separate assessment of the property within the city for the preceding year made or required by law — the introduction of the assessments for State and county taxes embracing all taxable property within the county and townships of which the city formed a part, from which, in connection with a map, the location and taxable value of all the property within the limits of the city for that year could be readily ascertained. *Held*, that the evidence, being the best which the law afforded, was properly admitted. *Id.*

11. *Quære*, Is the city legally bound to refund to the proper parties the money which her authorized agents or officers received and paid into her treasury, as the proceeds of the sale of the bonds. *Id.*

12. A city in Missouri, having lawful power to borrow money and provide for the payment of her debts, issued her bonds for the purpose of raising the means to pay her interest-bearing debt and the expenses of her government. They recite that they are issued under the authority of her charter, and an ordinance pursuant thereto passed Jan. 8, 1867. Although not actually executed until July 16, 1872, they were antedated as of Jan. 1, 1872, for the purpose of evading a law of the State passed March 28, 1872, which enacts that no bond thereafter issued by any county, city, or incorporated town, for any purpose whatever, shall be valid or negotiated until it is registered by the State auditor, and his certificate of such registration indorsed thereon. A., believing that the bonds were what on their face they purported to be, and, therefore, obligatory on the city, bought them in good faith from her authorized agent, and the money paid therefor went into her treasury. *Held*, 1. That the city was in the market as a borrower, and received the money in that character notwithstanding the transaction assumed the form of a sale of her securities, upon which, they being defectively executed, a suit could not be maintained. 2. That A. is entitled to recover the money paid, with interest thereon, from the time the obligation of the city to pay was denied. *Louisiana* v. *Wood*, 294.

13. The power of the city conferred by her charter to borrow money to take up her bonded indebtedness was not repealed by the eleventh section of the act of March 28, 1872, which enacts that "any county, city, or town that desires to place its outstanding indebtedness, under the provisions of this act, may do so by funding the same, and issuing new bonds in lieu of the present ones, upon such terms and bearing such interest, with such length of time to run, as

MUNICIPAL BONDS (*continued*).
may be agreed upon between the county, city, or town and the holders of its bonds." *Id.*
14. The bonds of a municipal corporation issued in payment of its subscription to the stock of a railroad company are void, unless the statute confers in express terms, or by reasonable implication, authority to issue them. *Wells* v. *Supervisors*, 625.
15. The laws of Mississippi bearing upon the right of the authorities of Pontotoc County to subscribe for stock in the Selma, Marion, and Memphis Railroad Company (formerly known as the Memphis, Holly Springs, Okolona, and Selma Railroad Company), stated and considered, and the conclusion reached, that the bonds issued July 1, 1877, in payment of such subscription, and reciting that they are "issued under and pursuant to an order of the board of police of said county of Pontotoc, now known as the board of supervisors of said county, made under the authority of the Constitution and laws of said State of Mississippi, authorized by a vote of the people of said county at a special election held for the purpose on the twentieth day of November, A.D. 1869," are void, there having been no authority of law to issue them. *Id.*
16. *Lynde* v. *The County* (16 Wall. 6) distinguished. *Id.*
17. An act of the General Assembly of Missouri, approved Jan. 4, 1860, authorizes counties, towns, and cities to subscribe to the stock of a railroad company which it incorporated, and issue bonds in payment therefor. The seventh section enacts that "upon the presentation of a petition of the president and directors of said company to the county court of any county through which said road may be located, praying that a vote may be taken in any strip of country through which it may pass, not to exceed ten miles on either side of said road; that the inhabitants thereof are desirous of taking stock in said road and of voting upon themselves a tax for the payment of the same, — it shall be the duty of said county court to order an election therein, and shall prescribe the time, place, and manner of holding said election; and if a majority of the taxable inhabitants shall determine in favor of the tax, it shall be the duty of said court to levy and collect from them a special tax, which shall be kept separate from all other funds and appropriated to no other purposes, and as fast as collected shall cause the same to be paid to the treasurer of said company." *Held*, that the affirmative vote of the inhabitants of such a strip authorized the county court to levy, collect, and pay over to the treasurer of the company such special tax, but it did not create a debt of the county, as such, for which bonds might be issued under that act or the act of March 24, 1868, authorizing "counties, cities, and incorporated towns to fund their respective debts." *Ogden* v. *County of Daviess*, 634.
18. The act of March 24, 1870, entitled "An Act to amend an act to facilitate the construction of railroads in the State of Missouri, approved March 23, 1868," granted no new power of subscription. The act of 1868 related entirely to municipal townships as such. *Id.*

MUNICIPAL BONDS (*continued*).

19. The court reaffirms its former rulings that the holder of a municipal bond is chargeable with notice of the statutory provisions under which it was issued. *Id.*

MUNICIPAL CORPORATIONS.

Upon consideration of the legislation of Tennessee, being chapter 10 of acts of 1879, entitled "An Act to repeal the charters of certain municipal corporations, and to remand the territory and inhabitants thereof to the government of the State," approved Jan. 30, 1879; chapter 11, entitled "A Bill to establish taxing districts in this State, and to provide the means of local government for the same," approved Jan. 30, 1879; and chapter 92, entitled "An Act to collect and dispose of the taxes assessed for municipal corporations in this State whose charters have been or may be repealed, or which may surrender their charters, and to provide for the compromise and make settlement of the debts of such distinct municipal corporations, respectively," approved March 14, 1879 (*supra*, pp. 477, 479, 490), the court *holds*: —

1. Property held by the city of Memphis for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing-places, fire-engines, hose and hose-carriages, engine-houses, engineering instruments, and generally all things held for governmental purposes, cannot be subjected to the payment of its debts. Upon the repeal of its charter, such property passed under the immediate control of the State, the power once delegated to the city in that behalf having been withdrawn. *Meriwether* v. *Garrett*, 472.

2. The private property of individuals within the limits of the territory of the city cannot be subjected to the payment of the debts of the city except through taxation. *Id.*

3. The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature. *Id.*

4. Taxes levied according to law before the repeal of the charter, other than such as were levied in obedience to the special requirement of contracts entered into under the authority of law, and such as were levied under judicial direction for the payment of judgments recovered against the city, cannot be collected through the instrumentality of a court of chancery at the instance of the creditors of the city. Such taxes can only be collected under authority from the legislature. If no such authority exists, the remedy is by appeal to the legislature, which alone can grant relief. Whether taxes levied in obedience to contract obligations, or under judicial direction, can be collected through a receiver appointed by a court of chancery, if there be no public officer charged with authority from the legislature to perform that duty, is not decided, as the case does not require it. *Id.*

5. The receiver and back-tax collector appointed under the authority of the act of March 13, 1879, is a public officer, clothed with authority from the legislature for the collection of the taxes levied

MUNICIPAL CORPORATIONS (*continued*).
before the repeal of the charter. The funds collected by him from taxes levied under judicial direction cannot be appropriated to any other uses than those for which they were raised. He, as well as any other agent of the State charged with the duty of their collection, can be compelled by appropriate judicial orders to proceed with the collection of such taxes by sale of property or by suit, or in any other way authorized by law, and to apply the proceeds upon the judgments. *Id.*

6. The bills in this case not having been framed with a view to any such purpose, cannot be amended so as to obtain relief against such receiver and back-tax collector. *Id.*

NATIONAL BANKS. See *State Courts, Jurisdiction of.*

1. Where, in order to discharge the liabilities of an insolvent national banking association, the comptroller of the currency assessed against the several shareholders a sufficient percentage upon the par value of the stock by them respectively held, he has no power to direct a further assessment to supply the deficit caused by the inability of the receiver to enforce payment from such as are insolvent or beyond the jurisdiction. *United States* v. *Knox*, 422.
2. "In addition to the amount invested in the shares," the holders thereof, after the exhaustion of the assets of the association, are, to a sum not exceeding the par value of the shares, "individually responsible, equally and ratably and not one for another," for its outstanding debts. The liability is several, and is not affected by the failure of any other shareholder to pay the amount assessed against him. *Id.*

NAVIGATION. See *Admiralty*, 1; *Commerce*, 3, 5, 6.

NEGLIGENCE. See *Land, Liability of Owner of; Passengers, Carrier of.*

NEGOTIABLE PAPER. See *Bills of Exchange and Promissory Notes, Judgment*, 1.

NEW TRIAL. See *Jurisdiction*, 1.

NOTICE. See *Bills of Exchange and Promissory Notes*, 1, 2; *Judgment*, 1; *Municipal Bonds*, 7, 14, 15, 19.

OFFICER OF THE ARMY OR THE NAVY, DISMISSAL OF.

1. An officer of the army or the navy was, June 20, 1866, subject to summary dismissal from the service by order of the President. *McElrath* v. *United States*, 426.
2. On the twenty-seventh day of June, 1866, the President nominated to the Senate A. to be a first lieutenant in the Marine Corps from the twentieth day of that month, *vice* B. dismissed. The Senate advised and consented to the appointment agreeably to the nomination, and A. was commissioned July 13, 1866. *Held*, that such appointment, followed by a commission, operated to discharge B. from the service as effectually as if he had been dismissed by the direct order of the President. *Id.*

OFFICER OF THE ARMY, &c., DISMISSAL OF (*continued*).

3. So much of sect. 5 of the act of July 13, 1866 (14 Stat. 92), as provides that "no officer in the military or naval service shall, in time of peace, be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof," did not take effect before Aug. 20, 1866, on which day, in contemplation of law, the rebellion against the national authority was suppressed, and peace restored. *Id.*

OFFICER OF THE UNITED STATES, BRIBERY OF.

A party who bribes an officer of the United States with money cannot maintain an action to recover it. *Clark* v. *United States*, 322.

OHIO RIVER, NAVIGATION OF. See *Jurisdiction*, 13.

PAROL EVIDENCE. See *Bills of Exchange and Promissory Notes*, 8; *Evidence*, 1.

PARTIES. See *Assignee in Bankruptcy; Judgment; Jurisdiction*, 14.

PARTITION. See *Lands, Partition of.*

PARTNERSHIP. See *Mining Partnership.*

Where the signature of a firm name to an instrument shows that it was intended to be the act of all the partners, effect must be given to it accordingly, although only one of them is named in the body of the instrument. *George* v. *Tate*, 564.

PASSENGERS, CARRIER OF.

1. A carrier of passengers for hire is bound to observe the utmost caution, and is responsible to them for such injuries received in the course of their transportation as might have been avoided or guarded against by his exercise of extraordinary vigilance, aided by the highest skill. *Pennsylvania Company* v. *Roy*, 451.
2. Such caution and vigilance extend to all the appliances and means used by him in transporting them. He must, therefore, provide cars or vehicles adequate, that is, sufficiently secure as to strength and other requisites, for their safe conveyance, and he is liable in damages if, by reason of the slightest negligence or fault in that regard, injury results to a passenger. *Id.*
3. A passenger purchased from a railroad company a ticket over its line, and at the same time, from a palace-car company, a ticket entitling him to a berth in one of its sleeping-cars, constituting a part of the train of the railroad company. In the course of transportation he was injured by the falling of a berth in the sleeping-car in which he was at the time riding. *Held*, that for the purposes of the contract with the railroad company for transportation, and in view of its obligation to use only cars that were adequate for safe conveyance, the palace-car company, its conductor and porter, were, in law, the servants and employés of the railroad company, and that the negligence of any of them, as to matters involving the safety or security of passengers, was that of the railroad company. *Id.*

PASSENGERS, CARRIER OF (*continued*).

4. In such case, the injured passenger being entitled only to compensatory damages, evidence as to his poverty, or the number and ages of his children, is irrelevant. *Id.*

PATENT OF THE UNITED STATES FOR LAND. See *Pleading*, 2.

1. When a patent for a part of the public lands has been regularly signed, sealed, countersigned, and duly recorded, the patentee has a perfect right to the possession thereof. *United States* v. *Schurz*, 378.
2. In the progress of the proceedings to acquire, under the laws of the United States, a title to public land, the power of the Land Department over them ceases when the last official act necessary to transfer the title to the successful claimant has been performed. *Id.*
3. Title by patent from the United States is title by record, and the delivery of the instrument to the patentee is not, as in a conveyance by a private person, essential to pass the title. *Id.*
4. Therefore, when the officers whose action is rendered by the laws necessary to vest the title in the claimant have decided in his favor, and the patent to him has been duly signed, sealed, countersigned, and recorded, the title to the land passes, and the ministerial duty of delivering the instrument to him can be enforced by *mandamus*. *Id.*
5. An acceptance of the grant will, in such case, be presumed from his efforts to secure the favorable action of the department, and especially from his demand for the possession of the patent. *Id.*

PENALTY. See *Criminal Law*.

PERSONAL CHATTELS, SALE AND DELIVERY OF.

1. In Missouri, where personal chattels have been sold and delivered, the vendee's mortgage or deed of trust on them to secure the purchase-money, he still retaining possession of them, is invalid against his creditors, unless it be acknowledged or proved, and recorded in the county in which he resides, in such manner as conveyances of land are, by law, directed to be acknowledged or proved and recorded. *Heryford* v. *Davis*, 235.
2. A contract between A., a manufacturer of cars, and B., a railroad company in Missouri, recites that A. thereby agrees to loan to B., for hire, certain cars to be used upon its road "for hire as aforesaid;" that A. has received from B. its three promissory notes, two at sixty days and the other at four months, together with certain bonds of the company as collateral for said notes; that A. is to hold the notes as collateral security and collect them at maturity, and hold the proceeds for the safe custody and return to A., when demanded, of said cars delivered to B. "for the term of four months, for hire as aforesaid," the latter to have the right and privilege at any time during the four months to purchase the cars upon the payment to A. of $6,338.40, that being the amount of the notes; that until such payment is made in full B. shall have no right, title,

PERSONAL CHATTELS, &c. (*continued*).

claim, or interest in or to the cars, except as to their use for hire, but that they shall remain the property of A., to be accounted for by B. and redelivered to A. in default of the payment of the $6,338.40; that in the event of default being made in the payment of said notes, and A. shall elect to take the cars into his possession, the sums collected on the notes shall be retained by him for his own use, together with such a sum, to be realized from the sale by him of the cars, as may be needed to make the amount due and unpaid on the notes, the balance, if any, to be paid to B.; that upon the payment by the latter of said notes at maturity without hinderance or delay said cars shall belong to and become the property of B., and that A. will relinquish his ownership to them, and give B. a good and sufficient bill of sale or conveyance thereof. The cars were delivered to B., but the contract was not recorded. C., having obtained a judgment against B., levied his execution on the cars. *Held*, 1. That the contract was not a bailment nor a conditional sale, but that under it the ownership of the cars passed to B. 2. That to protect them from seizure and sale under C.'s execution the contract should have been recorded in the manner prescribed by the laws of Missouri for recording mortgages or deeds of trust of personal property. *Id.*

PILOTAGE.

1. The pilot laws of the State of New York are not in conflict with the Constitution of the United States. *Ex parte McNiel* (13 Wall. 236) and *Cooley* v. *Board of Wardens of Port of Philadelphia* (12 How. 299) cited and reaffirmed. *Wilson* v. *McNamee*, 572.
2. The pilot may recover pilotage, although his services were tendered to, and refused by, the master of the vessel, when she was without the jurisdiction of the State. *Id.*

PLEADING. See *Bills of Exchange and Promissory Notes*, 3; *Estoppel*, 5; *Jurisdiction*, 11, 12; *Letters-patent*, 3.

1. A bill in chancery to set aside a judgment or a decree of a court of competent jurisdiction on the ground of fraud must set out distinctly the particulars of the fraud, the names of the parties who were engaged in it, and the manner in which the court or the party injured was misled or imposed on. *United States* v. *Atherton*, 372.
2. A bill to set aside or annul a patent of the United States for public lands, or to correct it on account of fraud or mistake, must show, by like averments, the particulars of the fraud, and the character of the mistake and how it occurred. *Id.*

POST ROADS. See *Causes, Removal of*, 1.

PRACTICE. See *Appeal; Court and Jury*, 8; *Income Tax*, 1; *Jurisdiction*, 1, 4–6, 9, 11, 12, 16; *Lands, Partition of*, 1; *Municipal Corporations*, 5, 6; *Public Money, Person accountable for*, 2.

1. A petition for a rehearing cannot be filed after the term at which the judgment was rendered. *Brooks* v. *Railroad Company*, 107.

PRACTICE (*continued*).

2. This court will not by *mandamus* compel an inferior court to reverse a decision made in the exercise of its jurisdiction. *Ex parte Perry*, 183.
3. Exceptions reserved at the trial of the cause may, within such time thereafter during the term as the judge shall deem reasonable, be reduced to form and presented to him for signature, and they are not waived by suing out a writ of error before his signature is obtained. *Hunnicutt* v. *Peyton*, 333.
4. Where, under such circumstances, bills of exceptions are signed during the term, it is not necessary, to render them effective, that they be antedated, or ordered to be filed *nunc pro tunc*, as of a time during the trial. *Id*,
5. An objection not taken in the court below cannot be considered here. *Wilson* v. *McNamee*, 572.
6. A. sued out a writ of error returnable to the October Term, 1877. The return was duly made, the transcript of the record lodged in the clerk's office in September of that year, and a citation issued and served in time; but by an oversight of A.'s counsel no fee-bond was given. The cause was not docketed. In September, 1878, the bond was filed and the cause then docketed, no motion to docket and dismiss having in the mean time been made. *Held*, that a motion made at the present term to dismiss the writ must be denied. *Edwards* v. *United States*, 575.
7. Where, under the practice established in Utah, issues are tried by the court, its findings of fact should be announced and filed before the entry of the judgment. *Kahn* v. *Smelting Company*, 641.
8. After such an entry, an additional finding, made at the request of either party without notice to the other, forms no part of the record. *Id.*
9. In a suit to compel an account for the proceeds of a mining claim, a finding by the court that there was no such co-tenancy between the parties in the mine in controversy as to entitle the plaintiff to an accounting, is a mere legal inference, and not a sufficient finding of fact upon which to base a decree. *Id.*

PRE-EMPTION. See *School Lands*, 2, 3.

PRESUMPTION. See *Court and Jury*, 3; *Patent of the United States for Land*, 5.

PRINCIPAL AND AGENT. See *Bankruptcy*, 1; *Bills of Exchange and Promissory Notes*, 3.

PRIVATE BOUNDARY. See *Deceased Persons, Declarations of.*

PRIVATE LAND-CLAIMS. See *Mexican Land-Grants.*

PRIVATE PROPERTY. See *Municipal Corporations*, 2.

PRIVATE PROPERTY, TAKING THEREOF FOR PUBLIC USE. See *Constitutional Law*, 12.

PRIVIES See *Judgment*, 2.

PROCESS. See *Jurisdiction*, 11.

PROMISSORY NOTES. See *Bills of Exchange and Promissory Notes.*

PROPERTY HELD BY A CITY FOR PUBLIC USES. See *Municipal Corporations*, 1.

PROPRIETARY STAMPS. See *Public Money, Person accountable for.*

PROVISIONAL SEIZURE, WARRANT OF. See *Bankruptcy*, 7, 8.

PUBLIC LANDS. See *Mexican Land-Grants; Patent of the United States for Lands; School Lands.*

PUBLIC MONEY, PERSON ACCOUNTABLE FOR. See *Evidence*, 8.

1. A manufacturer to whom, pursuant to sect. 3425 of the Revised Statutes, the Commissioner of Internal Revenue sells proprietary stamps on credit is not, in default of payment therefor, accountable for public money, and does not forfeit the commissions to which he is, under that section, entitled. *United States* v. *Goldback*, 623.
2. Where the manufacturer, when sued, paid into court the amount due upon the stamps after deducting his commissions, and it was then stipulated that the case should be submitted, the only point in issue being as to his right to them, — *Held*, that the United States was not entitled to judgment for the costs which accrued after the date of such payment. *Id.*

PUBLIC POLICY. See *Claims against the United States*, 2.

PUBLICATION, SERVICE OF PROCESS BY. See *Jurisdiction*, 11.

RAILROAD COMPANIES, CONSOLIDATION OF. See *Municipal Bonds*, 2.

RAILROAD COMPANIES, SUBSCRIPTIONS TO CAPITAL STOCK OF. See *Municipal Bonds*, 1, 2, 4, 14, 17–19.

REBELLION, WHEN IN CONTEMPLATION OF LAW, SUPPRESSED.

The rebellion was, in contemplation of law, suppressed Aug. 20, 1866. *McElrath* v. *United States*, 426.

RECEIVER. See *Appeal*, 6; *Mortgage*, 1; *Municipal Corporations*, 5, 6.

RECORD. See *Lands, Partition of; Practice*, 8.

REHEARING.

A petition for a rehearing cannot be filed after the term at which the judgment was rendered. *Brooks* v. *Railroad Company*, 107.

REISSUED LETTERS-PATENT. See *Letters-patent*, 1, 6, 8–10, 12, 14–17.

A reissue can only be granted for the same invention which was originally patented. *Manufacturing Company* v. *Ladd*, 408.

REMOVAL OF CAUSES. See *Causes, Removal of.*

RES JUDICATA.

A decree dismissing a bill *without prejudice* is not a bar to a subsequent suit for the same cause of action. *County of Mobile* v. *Kimball*, 691.

REVISED STATUTES OF THE UNITED STATES.

The following sections referred to and explained: —

Sect. 709. See *Jurisdiction*, 7; *State Courts, Re-examination of the Final Judgments and Decrees of*, 4.
Sect. 858. See *District of Columbia, Supreme Court of.*
Sect. 1059. See *Constitutional Law*, 5.
Sect. 1060. See *Constitutional Law*, 5.
Sect. 1061. See *Constitutional Law*, 5.
Sect. 2903. See *Foreign Coins, Value of*, 2.
Sect. 3281. See *Estoppel*, 5.
Sect. 3296. See *Criminal Law; Estoppel*, 5.
Sect. 3303. See *Estoppel*, 5.
Sect. 3477. See *Claims against the United States*, 2.
Sect. 3564. See *Foreign Coins, Value of*, 2.
Sect. 4283. See *Constitutional Law*, 6.
Sect. 4289. See *Constitutional Law*, 6.
Sect. 5440. See *Estoppel*, 5.

RIPARIAN OWNERS.

The second section of the act of the General Assembly of Iowa, entitled "An Act in relation to riparian owners on the Mississippi and Missouri Rivers," approved March 18, 1874, is not in conflict with any statute of the United States. Where, therefore, the owner of lands on the Mississippi had made an embankment in front of them, and at its outer end beyond low-water mark erected, without the direction or consent of the Secretary of War, a stone pier or crib, this court affirms the judgment of the Supreme Court of that State, declaring that under that section a railway company cannot construct its road over the embankment between high and low water mark, unless the damages to such owner shall first be ascertained and paid. *Railway Company* v. *Renwick*, 180.

SCHOOL LANDS.

1. The grant of the sixteenth and thirty-sixth sections of public land to the State of California for school purposes, made by the act of March 3, 1853 (10 Stat. 246), was not intended to cover mineral lands. Such lands were, by the settled policy of the general government, excluded from all grants. *Mining Company* v. *Consolidated Mining Company*, 167.
2. Neither in regard to the acts to be done nor the qualifications of the settler, is a settlement, within the meaning of sect. 7 of that statute, required to be precisely the same as that whereby a pre-emption right can be secured under the act of Sept. 4, 1841. 5 Stat. 453. *Id.*

SCHOOL LANDS (*continued*).

3. Whenever, at the time the government surveys of section 16 or 36 of public land in California are made, there is, by the erection of a dwelling-house or by cultivation, a settlement on any portion thereof, whereon some one resides who asserts claim thereto, the title to such portion does not vest in the State, but she has the right to other land in lieu thereof. *Sherman* v. *Buick* (93 U. S. 209) and *Water & Mining Company* v. *Bugbey* (96 id. 165) commented on and explained. *Id.*

SECRETARY OF THE TREASURY. See *Foreign Coins, Value of.*

SET-OFF. See *Court of Claims*, 2.

In an action at law upon a bond, a demand against the obligee, obtained by the defendant after notice of the assignment of the bond to the plaintiff, is not a matter of set-off. *George* v. *Tait*, 564.

SETTLEMENT AND CULTIVATION. See *School Lands*, 2, 3

SEVENTH AMENDMENT OF THE CONSTITUTION. See *Constitutional Law*, 5.

SPECIFIC PERFORMANCE. See *Damages.*

STATE COURTS, JURISDICTION OF.

Actions, local in their nature, may be maintained in the proper State court against a national banking association in a county or a city other than that where it is established. *Casey* v. *Adams*, 66.

STATE COURTS, RE-EXAMINATION OF THE FINAL JUDGMENTS AND DECREES OF. See *Jurisdiction*, 10.

1. This court, in *Martin* v. *Hunter's Lessee* (1 Wheat. 85), affirmed the constitutionality of sect. 25 of the Judiciary Act of 1789 (1 Stat. 85, re-enacted in sect. 709, Rev. Stat.), which, in certain cases therein mentioned, confers on this court jurisdiction to re-examine upon a writ of error the final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had. The doctrine then asserted, and ever since maintained, cannot be questioned here. *Williams* v. *Bruffy*, 248.
2. That jurisdiction attaches whenever the highest court of a State, by any decision which involves a Federal question, affirms or denies the validity of the judgment of an inferior court, over which it can by law exercise appellate authority, whether the decision, after an examination of the record of that judgment, be expressed by refusing a writ of error or *supersedeas*, or by dismissing a writ previously allowed. *Id.*
3. This court, when it has once acquired jurisdiction, may, in order to enforce its judgment, send its process to either the appellate, or the inferior, court. *Id.*
4. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, may, in the class of cases provided for in sect. 709, Rev. Stat., be re-examined here upon

STATE COURTS, &c. (*continued*).
writ of error, although it was rendered upon an equal division of opinion among the judges. It is immaterial whether that court, in rendering it, was exercising original or appellate jurisdiction. *Hartman* v. *Greenhow*, 672.

STATUTE OF LIMITATIONS. See *Limitations, Statute of.*

STATUTES OF THE UNITED STATES.
The following, among others, referred to, commented on, and explained: —

1789. Sept. 24. *c.* 20. See *Jurisdiction*, 7; *State Courts, Re-examination of the Final Judgments and Decrees of*, 4.
1841. Sept. 4. *c.* 16. See *School Lands*, 2.
1853. Feb. 26. *c.* 81. See *Claims against the United States*, 2.
1853. March 3. *c.* 145. See *School Lands*, 1, 2.
1862. July 14. *c.* 163. See *Customs Duties*, 1.
1862. July 17. *c.* 195. See *Confiscation.*
1863. March 3. *c.* 92. See *Constitutional Law*, 5.
1864. June 30. *c.* 171. See *Customs Duties*, 2.
1865. March 3. *c.* 78. See *Income Tax*, 1, 4.
1866. July 13. *c.* 176. See *Officer of the Army or the Navy, Dismissal of*, 3.
1867. March 2. *c.* 176. See *Bankruptcy*, 6.
1868. March 2. *c.* 15. See *Causes, Removal of*, 1.
1868. July 28. *c.* 186. See *Distiller.*
1870. July 14. *c.* 255. See *Customs Duties*, 1.
1873. March 3. *c.* 3. See *Foreign Coins, Value of.*
1874. June 22. *c.* 390. See *Bankruptcy*, 6.
1875. Feb. 16. *c.* 77. See *Admiralty*, 4.
1875. March 3. *c.* 137. See *Causes, Removal of*, 1.

STOCKHOLDERS OF AN INSOLVENT NATIONAL BANK, LIABILITY OF. See *National Banks.*

STOCK, SUBSCRIPTION TO. See *Municipal Bonds*, 1, 2, 4, 14, 17–19.
A., by his bond, acknowledged the receipt from an insurance company of ten shares of its capital stock, and agreed to pay $200 therefor, in instalments, — one-fourth on the receipt of the stock certificate, and the remainder in three equal amounts at three, six, and nine months from Jan. 7, 1871, the date of the bond. He paid on executing it $25, and his name was entered as a stockholder on the books of the company. The certificate was not delivered or demanded. In 1872 the company became bankrupt. *Held*, that the assignee is entitled to recover of A. the unpaid instalments. *Hawley* v. *Upton*, 314.

SUBSEQUENT PURCHASER. See *Deed of Trust.*

SUIT, FUND TO THE CREDIT OF. See *Mortgage*, 1.

SUITS IN PERSONAM.
The courts of the United States, as courts of admiralty, have not exclusive jurisdiction of suits *in personam* growing out of collisions between vessels while navigating the Ohio River. *Schoonmaker* v. *Gilmore*, 118.

SUPERSEDEAS. See *Appeal*, 7; *Jurisdiction*, 8.
A bond is not sufficient for the purposes of either an appeal to this court or a *supersedeas*, if the obligors are not thereby bound for the payment of costs, should the appellant fail to make his plea good. *Seward* v. *Corneau*, 161.

SURVEY. See *School Lands*, 3.

TAXATION. See *Constitutional Law*, 1, 9; *Income Tax; Municipal Corporations.*
Where, under a decree to enforce a statutory lien retained by the State upon the property, real and personal, stock, and franchises of a railroad company, the property and franchises were sold, — *Held*, that the property was thereafter subject to taxation under the laws of the State, as immunity therefrom, if possessed by the company, did not pass to the purchaser. *Railroad Company* v. *County of Hamblen*, 273.

TENNESSEE. See *Municipal Corporations.*

TEXAS. See *Ejectment; Evidence*, 5, 6.

TICE METERS. See *Distiller.*

TITLE. See *Patent of the United States for Lands*, 2-4.
An instrument gives color of title, — whether the grantor acts under authority of judicial proceedings or otherwise, — if by apt words of transfer it passes what purports to be the title; and the grantee's possession of the lands thereunder for the period mentioned in the Statute of Limitations bars the true owner's right of recovery. *Hall* v. *Law*, 461.

TREASURY DEPARTMENT, TRANSCRIPT FROM THE BOOKS AND PROCEEDINGS OF. See *Evidence*, 8.

TRUST, DEED OF. See *Deed of Trust.*

TRUSTEE. See *Deed of Trust.*

UTAH. See *Practice*, 7.

VACANT LANDS, ENTRY UPON, UNDER COLOR OF TITLE.
The possession of a person who, under color of title, enters upon vacant lands, and holds adversely, is construed to include so much as is within the boundaries of his title, and to that extent the true owner will be deemed to be disseised. But if the latter be in actual possession of any part of the lands whereon the entry is made, his constructive seisin extends to all not in fact occupied by the intruder. *Hunnicutt* v. *Peyton*, 333.

VIRGINIA. See *Contracts*, 5, 6.

VOLUNTARY CONVEYANCE. See *Corporations*, 1.

WAIVER. See *Practice*, 3, 4.

WISCONSIN. See *Municipal Bonds*, 1, 2.

WITNESS, COMPETENCY OF.

Sect. 858 of the Revised Statutes touching the competency of witnesses in suits by or against executors, administrators, or guardians applies to the courts of the District of Columbia as fully as to the circuit and district courts of the United States. *Page* v. *Burnstine*, 664.

WRIT OF ERROR. See *Jurisdiction*, 7, 8; *Practice*, 3, 6; *State Courts*, *Re-examination of the Final Judgments or Decrees of*, 4.

A proceeding in the court below for contempt cannot be re-examined here on an appeal or a writ of error. *Hayes* v. *Fischer*, 121.

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